

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7321

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN
and EULA IEE BLOWERS

Plaintiffs-Appellants

-v-

ELISHA C. FREEDMAN, individually and as City Manager of the
City of Rochester; THOMAS P. RYAN, JR., individually and as
Mayor of the City of Rochester; THOMAS GOSNELL, individually
and as President of Lawyers Cooperative Publishing Company;
LAWYERS COOPERATIVE PUBLISHING COMPANY, INC.

Defendants-Appellees

ON APPEAL FROM THE DECISION AND
ORDER OF THE UNITED STATES DISTRICT
COURT OF THE WESTERN DISTRICT OF
NEW YORK

Civil Action No. 74-522

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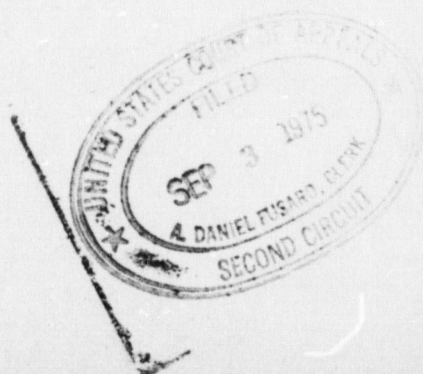


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STATEMENT OF THE ISSUES PRESENTED

QUESTION 1:

Did the court below err in granting the motions to dismiss and for summary judgment when all of the material issues of fact between the parties are in dispute, discovery, though duly notice [redacted] stayed and the complaint states a conspiracy between the defendants to underwrite, foster and promote, directly and indirectly, employment discrimination?

QUESTION 2:

Did the court below err in denying the application for preliminary injunction without hearing or affording opportunity to be heard?

STATEMENT OF THE CASE

This is an appeal from the Order and Decision of the Honorable Harold P. Burke, Judge, United States District Court for the Western District of New York dismissing the complaint of the Genesee Valley Chapter of the National Organization for Women (hereafter N.O.W.) and Eula Lee Blowers charging that a lease-contract for the perpetual lease of public property among the defendants-appellees is unconstitutional and illegal. The Order and Decision was made April 24, 1975 and was granted upon defendants-appellees motions to dismiss or for summary judgment - after discovery duly noticed by plaintiffs N.O.W. and Blowers had been stayed by the court. The Order and Decision below is unreported but appears in the Joint Appendix at pages 262-267.

For years, the City of Rochester has been the owner of a statue of the mythical Greek god, Mercury, a twenty-one foot, seven hundred pound, coopersheet likeness. From approximately 1882 until 1951 this statue was displayed on a building in downtown Rochester, New York. In 1951, the statue was removed from public display because the building, then known as the City Hall Annex, was demolished to provide room for the construction of another public building, the War Memorial.

(A 7,8)*

* References are to pages in the Joint Appendix.

The Mercury statue which so long dominated the City of Rochester skyline, became a symbol of the City. It is a local public treasure, some say work of art. It embodies Rochestarians' spiritual identity with their city. It is of inestimable value. (A 8, 27-30,130,132,133)

While the statue was in storage since its removal from City Hall Annex in 1951, the City of Rochester has been publically committed to place the statue on public view. A master plan approved by the City and County of Monroe on or about July 26, 1956, designated the new Civic Center Plaza as the new site for public display. Through the years, other proposals for the display of the statue have been advanced, including making the Mercury Statue the focal point of a new city park. (A8,27-30)

Suddenly, notwithstanding the City of Rochester commitment through the master plan and notwithstanding the numerous proposals for alternate sites of public display and public financing of the Mercury statue, Rochester City Manager Elisha Freedman and/or Rochester City Mayor Thomas Ryan and/or Thomas Gosnell, president of Lawyers Cooperative Publishing Company, all defendants herein, disclosed in news releases or news conference announcements, beginning April of 1974, that arrangements had been concluded to lease the Mercury statue to Lawyers Cooperative Publishing Company for public display. (A 8)

Plaintiffs N.O.W. and Blowers and/or their representatives

sought information from individual members and/or aids to members of the Rochester City Council as to the exact terms and conditions of any arrangement between agents of the City of Rochester and Lawyers Cooperative Publishing Company for the display of this public property. These inquiries were pursued from about July 15, 1974 to August 13, 1974 with plaintiffs N.O.W. and Blowers and/or their representatives being told by the various members of the City of Rochester City Council that they were unfamiliar with any writing evidencing the understanding between agents of the City and Lawyers Cooperative Publishing Company for the display of the Mercury statue and were moreover unaware of the substance of any oral understanding between agents of the City and Lawyers Cooperative Publishing Company in that regard. (A 8,9)

The inquiries of N.O.W. and Blowers and/or their representatives of Rochester City Council members led to the suggestion that they ask City of Rochester Corporation Counsel, Louis N. Kash, for a copy of any written understanding existent between agents of the City and Lawyers Cooperative Publishing Company for the display of the Mercury statue or as to the substance of any oral arrangement. As soon as the City of Rochester Corporation Counsel, Louis N. Kash, was available from his summer vacation, on August 12, 1974, plaintiffs and their lawyer met with him. They were informed that he had no personal

knowledge of any written or oral understanding about the public display of the Mercury statue. But attorney Kash indicated that he would undertake a more thorough search of his files to ascertain whether his predecessor in office might have been involved in the execution of such a document or might have made reference to an oral understanding. N.O.W. representatives advised the Corporation Counsel Kash that a formal complaint of illegality of any "arrangement" between agents of the City and Lawyers Cooperative Publishing Company would be made before the next City of Rochester Council meeting. (A 9, 10)

Plaintiffs or their representatives complained to attorney Kash or to City Council members or their aids that any action of the City or any action on behalf of the City in arranging for the display of the public property, Mercury statue, by Lawyers Cooperative Publishing Company would be illegal in view of the City's obligation under law not to engage in any discriminatory practice in employment and not to do business with, contract, lease, for example, or to aid, directly or indirectly, any entity that discriminates. (A 9, 10)

Because of the denial by Lawyers Cooperative Publishing Company of equal employment opportunities to N.O.W. members and to women as a class, the Genesee Valley Chapter of the National Organization for Women had initiated charges of company-wide, class-wide discrimination in employment against Lawyers Cooperative Publishing Company in December of

1971 with the New York State Division of Human Rights, cross-filing those charges with the Equal Employment Opportunity Commission, pursuant to Title VII of the Civil Rights Act of 1964. In due course, plaintiff N.O.W. was issued its Right to Sue Notice, pursuant to Title VII of the Civil Rights Act, applied to be added as a named party plaintiff and member of the class in Blowers, individually, and on behalf of all other persons similarly situated v. Lawyers Cooperative Publishing Company, Inc., et al, Civil Action No. 1973-47, and separately filed Loughney and N.O.W. v. Lawyers Cooperative Publishing Company, Inc., Civil Action No. 1973-238 and Nageotte and N.O.W. v. Lawyers Cooperative Publishing Company, Civil Action No. 1973-343. Plaintiff N.O.W. was an intervenor in Lawyers Cooperative Publishing Company v. Schlesinger, et al, Civil Action No. 1974-212, Memorandum Decision and Order, April 22, 1975 - a lawsuit in which Lawyers Cooperative Publishing Company sought to suppress the production of documents directly supporting the claims of discrimination in the other lawsuits. (A 5,6)

Plaintiff Blowers is a former employee of defendant Lawyers Cooperative Publishing Company, having been terminated after complaining of the illegal employment practices of Lawyers Cooperative Publishing Company and after having refused to take action against persons who also complained of those practices. Plaintiff Blowers has claims of company-wide, class-wide employment discrimination pending against Lawyers Cooperative

Publishing Company before the New York State Division of Human Rights and Federal District Court - the first claim having been filed in December of 1971. Plaintiff Blowers was an intervenor in Lawyers Cooperative Publishing Company v. Schlesinger, et al; Civil Action No. 1974-212. (A 6,7)

Additionally, N.O.W. had complained of the Lawyers Cooperative Publishing Company employment discrimination to the Federal government's Office of Federal Contract Compliance. That investigation resulted in the federal government's sustaining the complaints of company-wide, class-wide employment discrimination against Lawyers Cooperative Publishing Company and the federal government's directing Lawyers Cooperative Publishing Company to show cause why their federal contracts should not be terminated. The investigation of the N.O.W. and Blowers complaints before the New York State Division of Human Rights had led to findings of "probable cause" to believe discrimination had been and is being practiced by Lawyers Cooperative Publishing Company as charged. (A 44-55, 92-94, 133-134)

The N.O.W. and Blowers complaints of employment discrimination were investigated by the Equal Employment Opportunity Commission, the federal agency with responsibility for the enforcement of Title VII of the Civil Rights Act of 1964. The Commission certified that the discrimination practiced by Lawyers Cooperative Publishing Company is of general public concern and

filed application to intervene in the Title VII litigation pending in the district court, asserting the same claims of company-wide, class-wide discrimination that N.O.W. and Blowers assert. (A 14, 15, 56-62) [The District Court's denial of the Commission's application to intervene is before this court in Blowers v. Lawyers Cooperative Publishing Company, et al., docket no. 75-7210.]

In short, plaintiffs or representatives of plaintiffs pointed out to the City of Rochester Corporation Counsel and/or City Council members and their aids that there is ample documentation of Lawyers Cooperative Publishing Company employment discrimination and that any "arrangement" to allow this company to display the Mercury statue places the stamp of City approval on discrimination, places the power and prestige of the City behind an entity which discriminates and is therefore unconstitutional, illegal and in violation of public policy. (A 9, 10)

Plaintiffs or representatives of the plaintiffs appeared before the regular meeting of the Rochester City Council on August 13, 1974. Complaint was made that any "arrangement" between the City and/or agents of the City for display of the Mercury statue by Lawyers Cooperative Publishing Company would be in violation of law and public policy. Request was made for the immediate disclosure of all documents representing any part of the understanding. Request was made that any "arrangement" be

re-examined in light of the law and public policy controlling the lease of public property and the clear evidence that Lawyers Cooperative Publishing Company is violating laws against discrimination in employment. (A 10, 11)

During this meeting, City Council members continued to express their ignorance of or lack of information about any agreement with Lawyers Cooperative Publishing Company for the display of the Mercury statue. Near the conclusion of the meeting, City Corporation Counsel Kash made available to N.O.W. or its representatives a copy of a six-page written document which purports to be the written lease whereby defendant Freedman as agent of and on behalf of the City of Rochester gives defendant Lawyers Cooperative Publishing Company a perpetual lease of the public property, Mercury statue. (A 10, 11)

At the conclusion of or during the course of the City Council meeting on August 13, 1974, the Council formally directed its Corporation Counsel, Louis N. Kash, to undertake a study of the complaints by N.O.W. and its representatives and to make a prompt report of his findings to City Council. N.O.W. and its representatives responded to attorney Kash's request that they acquaint him with the substance and posture of the employment discrimination complaints pending against Lawyers Cooperative Publishing Company by forwarding copies of various documents to him. Attorney Kash acknowledged receipt of the materials by letter of August 20, 1974 and promised to give

expeditious consideration to his opinion on the legality of the lease of Mercury. (A 11, 37-41)

On or about September 3, 1974, N.O.W. formally advised defendants Gosnell and Lawyers Cooperative Publishing Company, by letter, of the illegality of the lease arrangement with agents of the City of Rochester and informed them that complaint of the illegality had been made to the Rochester City Council. (A 11, 12, 42)

So far as N.O.W. or its representatives were ever able to determine, the City of Rochester Corporation Counsel never issued the opinion on the legality of the lease, notwithstanding the commitment to make expeditious investigation and issuance of such opinion. (A 12)

By its own news release of October 31, 1974, Lawyers Cooperative Publishing Company disclosed plans of the formal opening of the display of the Mercury statue for November 15, 1974. Those plans prominently featured the participation of "city officials." (A 12, 43)

On November 7, 1974, N.O.W. and Blowers, plaintiffs herein, filed this action for injunctive relief, declaratory judgment and money damages. Plaintiffs seek a declaration that the lease-contract for the perpetual display of public property, Mercury statue is unconstitutional, in violation of plaintiffs' rights guaranteed by the Constitution's Fourteenth Amendment since no government entity can use its power of purse, contract,

lease or prestige to underwrite, aid, foster and/or promote, directly or indirectly an entity such as Lawyers Cooperative Publishing Company, which discriminates. Plaintiffs charge that the lease-contract constitutes an illegal and unconstitutional conspiracy among the defendants, under color of law, which has deprived and is depriving and will in the future deprive plaintiffs of their rights to equal protection of the laws, to equal employment opportunities and to the support of government in securing those rights. Further, the lease-contract is illegal because both federal and New York laws forbid agents of the City of Rochester from contracting with an entity, such as Lawyers Cooperative Publishing Company, which discriminates. (A 4,5)

Plaintiffs claim that Lawyers Cooperative Publishing Company maintains a policy, practice, custom and usage of discriminating against its female employees solely because of their sex with respect to compensation, terms, conditions and privileges of employment and limits, segregates and classifies its female employees, solely on the basis of sex, in ways which deprive and have deprived female employees of equal employment opportunities. Illegal employment practices are alleged to include but are not limited to (a) maintaining a system of recruitment and hiring which discriminates against women because of their sex; (b) maintaining a system of job classification and assignment which discriminates against women because of their

sex; (c) failing to transfer and promote female employees because of their sex; (d) conducting training and apprenticeship programs which discriminate against women because of their sex; (e) discriminating against female employees with respect to their compensation because of their sex; (f) discriminating against female employees because of their sex with respect to maternity leave and other employee benefits; (g) discriminating against female employees because of their sex with respect to terms and conditions of employment, including but not limited to harassment, intimidation and discipline; (h) conducting a policy of intimidation and harassment against female employees in retaliation for their opposing discriminatory company policies and practices; (i) discriminating against employees because they oppose practices made unlawful by Title VII or because they have made a charge, testified or participated in an investigation, proceeding or hearing under Title VII. (A 12, 13)

With the filing of the complaint herein, plaintiffs requested Federal District Court Judge Harold P. Burke to direct defendants to show cause why a preliminary injunction should not be granted restraining further performance of the lease-contract arrangement until claims of employment discrimination against Lawyers Cooperative Publishing Company were fully settled or litigated and Lawyers Cooperative Publishing Company is in full compliance with the laws against employment discrimination and any lease-contract agreement is executed pursuant to the

requirements of law. Plaintiffs further requested that the court temporarily restrain further performance of the agreement pending hearing on the preliminary injunction. The court ordered the defendants to show cause on November 11, 1974 why preliminary injunction should not issue; the court declined the application for temporary injunction. (A 76-31)

By the return date of the hearing on preliminary injunction, none of the defendants herein had yet filed or served any opposition to the application. Defendants, by counsel, orally opposed the granting of preliminary injunction at the hearing and requested that they be allowed additional time to respond to plaintiffs' papers. The court allowed defendants until early morning of November 12, 1974 to file such opposition and indicated that it would determine at that time whether further hearing was required. (A 128, 129, 151, 152)

Defendants' written responses were not in fact served until late afternoon on November 12, 1974. Plaintiffs immediately sought permission, by counsel, to respond in writing, were granted such permission by the court and filed further papers in support of application for preliminary injunction on November 13, 1974. As plaintiffs pointed out in their responding papers, with the exception of the fact that there is a lease-contract for the perpetual display of the Mercury statue by Lawyers Cooperative Publishing Company, there are factual disputes as to all issues. N.O.W. and Blowers took issue with the City of

Rochester agents and/or officials that the project does not involve the expenditure of "public funds" or that numerous, written approvals of the lease-contract are "unnecessary." N.O.W. and Blowers dispute the Lawyers Cooperative Publishing Company and Gosnell assertion that there has never been any "finding" of discrimination against it or that there is presently no discrimination practiced at Lawyers Cooperative Publishing Company, for example. (A 128-136, 151, 152)

Without further submission or hearing, on November 14, 1974, the Honorable Harold P. Burke issued his findings of fact and conclusions of law denying the application for preliminary injunction. Plaintiffs immediately moved for reconsideration and/or stay pending appeal but those applications were denied by the court without hearing shortly after their filing on November 15, 1974. (A 145-149, 150-153)

On November 26, 1974, defendants Gosnell and Lawyers Cooperative Publishing Company served their answer on plaintiffs, generally denying the allegations of the complaint. At the same time, these defendants moved for dismissal of the complaint and/or for summary judgment contending that there are no issues of material fact in dispute between the parties and that the only questions to be resolved by the court are questions of law. Defendants Freedman and Ryan defaulted in answering the complaint. (A 155-168)

On November 29, 1974, plaintiffs duly served notice to take the deposition of defendant Elisha C. Freedman on December 4, 1974 and December 6, 1974. The notice also required the production of writings relating to the public ownership of the Mercury statue, the public expense involved in keeping and displaying the statue and the plans and circumstances for the public display of the statue. (A 169-171)

While counsel for defendant Freedman initially indicated that he would be "...more than happy to produce any of the items you request if they exist and are in our custody..." and that Mr. Freedman "...will gladly testify to anything about which he has personal knowledge," but that the times noticed were inconvenient, he thereafter failed to appear for the depositions at the mutually arranged new dates and failed to produce documents in advance of those dates, as had been agreed upon by counsel for plaintiffs and defendant Freedman. Notwithstanding that defendants Freedman and Ryan were in default in the action, the Honorable Harold P. Burke, at the request of defendants Freedman and Ryan signed order of show cause on December 16, 1974 staying "...all proceedings herein including the deposition on oral examination of Elisha C. Freedman..." and directing hearing on motion of defendants Freedman and Ryan to dismiss the complaint and grant summary judgment. (A 173-178; 189, 190)

Plaintiffs cross-moved to vacate stay of disclosure, to compel disclosure by the defendants and opposed defendants motions to dismiss and for summary judgment. Since defendants Freedman and Ryan were in default, there was no standing for any motion by them. Defendants Lawyers Cooperative Publishing Company and Gosnell had admitted in their Answer plaintiffs' allegation of causes of action under 42 U.S.C. §§1983 and 1985. All of plaintiffs' allegations of fact must, as a matter of law, be taken as true; the complaint could not be dismissed unless there was no showing, under any set of circumstances, of plaintiffs' succeeding at trial. Plaintiffs charge a conspiracy among the defendants to underwrite, directly or indirectly, illegal employment discrimination of Lawyers Cooperative Publishing Company. That conspiracy is evidenced by a lease-contract which defendants admit. Summary judgment may not be granted since all material facts, with the exception of the existence of the contract, are in dispute between the parties, including, for example expenditure of public funds in the transaction, the existence of discrimination at Lawyers Cooperative Publishing Company and the results of previous investigation of that discrimination by the federal government. In any event, the court ought reserve any decision on the motions for dismissal and summary judgment pending completion of depositions of defendant Freedman and agent of defendant Lawyers Cooperative Publishing Company, Donald S.

Bennett, and the answering of interrogatories by defendants Cosnell and Lawyer Cooperative Publishing Company. (A 179-188)

Thereafter by motion of January 8, 1975, defendants Gosnell and Lawyers Cooperative Publishing Company moved separately for protective order relieving them of their obligation to answer plaintiffs' interrogatories claiming, among other points that the interrogatories were served simply to "embarrass and annoy" the defendants, that the answers involved "undue expense." Plaintiffs cross-moved to compel disclosure pointing out that all of the information sought either by deposition or by the interrogatories is required to be disclosed under Federal Rule 26 since it directly relates to plaintiffs' claims that Lawyers Cooperative Publishing Company has discriminated and is discriminating in employment and that defendants Freedman and Ryan, acting illegally, but on behalf of the City of Rochester, and purporting to bind the City of Rochester, have acted and are acting in concert with defendants Gosnell and Lawyers Cooperative Publishing Company to underwrite, aid or facilitate, directly or indirectly, discrimination in employment. (A 238-260)

Without permitting any discovery whatsoever and without affording any opportunity to resolve the factual disputes between the parties at hearing, the court on April 24, 1975 dismissed the complaint as to all defendants. The court held that the complaint does not state facts upon which to base a

federal claim, that the court has no jurisdiction of the subject matter and that the court has no pendent jurisdiction over the claims founded on New York law. Plaintiffs filed Notice of Appeal on May 22, 1975. (A 262-267)

POINT I

THE COURT BELOW ERRED IN GRANTING THE MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT SINCE ALL OF THE MATERIAL ISSUES OF FACT BETWEEN THE PARTIES ARE IN DISPUTE, DISCOVERY, THOUGH DULY NOTICED WAS STAYED AND THE COMPLAINT STATES A CONSPIRACY BETWEEN THE DEFENDANTS TO UNDERWRITE, FOSTER AND PROMOTE, DIRECTLY AND INDIRECTLY, EMPLOYMENT DISCRIMINATION.

This action is brought under the Constitution of the United States, Fourteenth Amendment and pursuant to 42 U.S.C. §§ 1983 and 1985. The plaintiffs seek a declaration that the leasing agreement entered into among the defendants for the perpetual use and display by defendant Lawyers Cooperative Publishing Company of public property of the City of Rochester, a statue of Mercury, constitutes an illegal and unconstitutional act, taken under color of law, and constitutes an illegal and unconstitutional conspiracy among the defendants which have deprived and are depriving and will in the future deprive the plaintiffs of their rights to equal protection of the laws, to equal employment opportunities and to the support of government in securing those rights. The court has jurisdiction over the claims pursuant to 28 U.S.C. §§1331, 1343, 2201 and 2202.

Plaintiffs' claims, in summary are that first, the lease-contract agreement between the defendants for the display of public property on Lawyers Cooperative Publishing Company private property is unconstitutional. The lease-contract agreement

violates plaintiffs' constitutional rights to equal protection of the laws. No government entity, here, the City of Rochester, through its agents Freedman and Ryan, can use its power of appropriation, purse, taxation, contract, lease and/or prestige, to aid, foster and promote and/or assist directly or indirectly any person or entity that discriminates against females.

Secondly, the lease-contract agreement is illegal because under federal laws, including Title VII of the Civil Rights Act of 1964 and regulations adopted thereunder, Law Enforcement Assistance Administration Regulations, 28 CFR 42.201-308, Federal Revenue Sharing Regulations, 31 CFR 51, and all other regulations for the administration and/or expenditure of federal monies, the City of Rochester is forbidden through its agents, Freedman and Ryan, from engaging in any discriminatory employment practice or from doing business with, including contracting or leasing with, any person or entity which engages in any illegal employment practices.

The lease-contract for the display of the Mercury statue is void because it was not executed in compliance with Section 220.e of the Labor Law of the State of New York prohibiting execution of any public works contract unless there is made a part of that contract specific guaranty by the contractor to the public entity that the private entity has not discriminated, does not and will not discriminate in employment. The lease-contract

is void because it was not entered into after competitive bidding, as required by Rochester Municipal Code, §§8A-3(B) and (D); 8A-6; 8A-7; 8A-9; 8A-13; 8A-17. The lease-contract was not approved by the City of Rochester Comptroller as required by Rochester Municipal Code, Section 6.19. The lease-contract was not approved by the Rochester City Council as required by Rochester Municipal Code, Section 6-5. The lease-contract was executed in violation of the public policy and law of the State of New York and City of Rochester. Specifically, the lease-contract violates the public policy of the State of New York contained in Section 291 of the Executive Law (Human Rights Law) which guarantees the civil right of equal employment opportunities to all New York State citizens. The lease-contract agreement violates Rochester City Council Resolution 71-54, April 27, 1971, which endorses the enactment of the Executive Law (Human Rights Law) prohibiting discrimination against women in employment. (Copies of the state and city statutory, ordinance and regulatory materials referred to herein are submitted herewith as Appendix A.)

A. THE COMPLAINT STATES A CLAIM AGAINST DEFENDANTS FREEDMAN AND RYAN

Plaintiffs claim that the lease-contract between the defendants is a violation of their constitutional rights to equal protection of the laws, guaranteed by the Fourteenth

Amendment of the Constitution. No arm of government, federal, state or municipal, may, consistent with the Fourteenth Amendment's guaranty to equal protection of the laws, apply its laws or use its power of appropriation, purse, taxation, contract, lease or its prestige to foster or promote, directly or indirectly, discrimination. Norwood v. Harrison, 413 U.S. 455 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); Green v. Kennedy, 309 F.Supp. 1127 (D.D.C. 1970); Green v. Connally, 330 F.Supp. 1150 (D.D.C. 1971), aff'd. sub nom, Colt v. Green, 404 U.S. 997 (1971); McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972); Smith v. Young Men's Christian Association of Montgomery, Inc., 316 F.Supp. 899 (M.D. Ala. 1970), modified and aff'd., 462 F.2d 634 (5th Cir. 1972); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), cert. den. 326 U.S. 721 (1945).

The prohibition against government's aid of discrimination is absolute and complete; no precise causal relationship between the aid of government and the continued existence of the private entity need be shown. Thus, in Norwood v. Harrison, *supra*, the court held that a Mississippi textbook program was unconstitutional because it significantly aided organization and continuation of a separate system of private schools which might discriminate on the basis of race if they desired. The court ruled that:

"...[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. '[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up to only 49 per cent of the support of the segregated institution.'" Norwood v. Harrison, supra, at 465-466.

There is no basis in the record for the lower court's conclusion that the lease-contract for the display of Mercury by Lawyers Cooperative Publishing Company does not significantly involve the City of Rochester in the Company's employment discrimination. Nor is there any basis in the record for the court's conclusion that there is "no allegation that the City in any way enforced the alleged sex discrimination, nor is there any allegation of joint participation by the City in such alleged sex discrimination. There is no allegation that the City had any opportunity to control Lawyers Cooperative employment practices. There is no allegation of how the lease of Mercury has any effect on the employment practices of Lawyers Cooperative." (A 265, 266). In paragraph after paragraph of the complaint and supporting papers plaintiffs allege the significance of the

lease-contract as the City's underwriting of, enforcement of and support of Lawyers Cooperative Publishing Company employment discrimination. Plaintiffs allege with respect to joint participation among the defendants, a conspiracy among the defendants to deprive plaintiffs of their rights to equal protection of the laws. Plaintiffs allege not only that the City of Rochester, by its agent, Freedman and Ryan, had an opportunity to control Lawyers Cooperative employment practices but plaintiffs allege that the City of Rochester, by its agents, have an affirmative obligation to do so, imposed by the Constitution federal, state and local laws and regulations adopted thereunder. The effect of the lease-contract is to postpone enforcement of the laws and regulations forbidding employment discrimination against Lawyers Cooperative Publishing Company; the effect of the lease-contract is to perpetuate employment discrimination at Lawyers Cooperative Publishing Company.

Defendants Freedman and Ryan, as agents of the City of Rochester, have by the lease-contract given defendants Gosnell and Lawyers Cooperative Publishing Company perpetual use of the Mercury statue - a public treasure, some say work of art, and undoubtedly, from all accounts, city property which is the symbol of the City of Rochester and long identified with the Rochester skyline. Defendants Ryan and Freedman have bestowed a valuable public treasure, worth in excess of Fifty Thousand

Dollars (\$50,000.00) on a private entity; defendants Ryan and Freedman have placed the power, prestige, name and materials of the City behind a private entity; the City has placed its "stamp of approval" on the private entity by the lease-contract.

The lease-contract has placed the power, prestige, material, "stamp of approval" of the City behind and on a private entity which discriminates in employment; the defendants have thereby supported, enforced and underwritten, both directly and indirectly, that discrimination.

The evidence of Lawyers Cooperative Publishing Company employment discrimination is substantial and is a matter of public record. The New York State Division of Human Rights found "probable cause" with respect to the company-wide, class-wide claims of employment discrimination pending against Lawyers Cooperative Publishing Company. Such finding makes the State of New York a prosecutor of the claims, along with the complaining parties, to vindicate the New York civil right to equal employment opportunities. (See New York State Human Rights Law, Executive Law, §297.4.)

The Equal Employment Opportunity Commission, the federal agency charged with enforcing the federal laws against employment discrimination, has found company-wide, class-wide employment discrimination of Lawyers Cooperative Publishing Company to be of "general public importance." The EEOC has

served a comprehensive complaint against Lawyers Cooperative Publishing Company and is seeking to intervene in the litigation pending in the federal court pursuant to Title VII of the Civil Rights Act of 1964.

The Defense Department's Defense Supply Agency which is responsible for Lawyers Cooperative Publishing Company's adherence to Executive Order 11246, as amended, investigated the comprehensive employment discrimination complaint lodged by N.O.W. against Lawyers Cooperative Publishing Company and concluded that the Company was and is engaged in company-wide, class-wide employment discrimination, as charged. Findings of such discriminatory practices were made pursuant to federal regulations, 41 CFR 60-2.2(b). Lawyers Cooperative Publishing Company's debarment from all federal contracts was averted only by its agreeing to undertake, among other points, an immediate "validation" of all position descriptions and pay scales in the company. The Defense Department contract compliance officer has testified in Blowers, individually and on behalf of all other persons similarly situated v. Lawyers Cooperative Publishing Company, Civil Action No. 1973-47, that the company misrepresented the course of his investigation of the discrimination claims and his conclusions with respect to discrimination to company employees "...to discourage employees to file grievances of complaints to Federal and State agencies..."

The investigator has testified that there has been minimal progress at Lawyers Cooperative Publishing Company in eliminating the company-wide, class-wide discrimination since the initial identification of the problems. (A 72-74; 92-95; 134-141.)

Moreover, the record contains admissions by Lawyers Cooperative Publishing Company of its company-wide, class-wide employment discrimination. See for example, the company's identification of problem areas for its Rochester and Webster facilities where it admits the use of personnel requisitions which have specified the sex of a person desired for a job, admits the existence of numerous departments in the company where it employs only females and other numerous departments in the company where it employs only males. (A 97-104.)

Plaintiffs have alleged employment discrimination by Lawyers Cooperative Publishing Company and have substantiated those claims in their pleadings. Plaintiffs have alleged the impact of the lease-contract in question on that discrimination. Plaintiffs will prove these claims on trial.

However, for purposes of a motion to dismiss, all the plaintiffs' allegations must be taken as true. Plaintiffs' pleadings must be read in the light most favorable to them. A motion to dismiss may not be granted unless it is clear that the plaintiffs could not prove any set of facts on the pleadings which would entitle them to relief. Conley v. Gibson, 355 U.S. 41 (1957).

Not only do the plaintiffs have a claim against defendants Freedman and Ryan, as agents of the City of Rochester, based on the denial of the constitutional right to equal protection of the laws, but the plaintiffs have a claim against defendants Freedman and Ryan, as agents of the City of Rochester, for violation of Federal laws which forbid a city, through its agents, from engaging in any discriminatory employment practice or from doing business with, including contracting or leasing with, any person or entity which engages in any illegal employment practice.

Title VII of the Civil Rights Act of 1964 places an affirmative obligation on the City of Rochester, through its agents, to police its contracts so as not to aid, either directly or indirectly, employment discrimination. The City of Rochester recognized this obligation under Title VII when it accepted the Interim Report of the Civil Service Task Force appointed by the City Manager, adopted the resolution for the establishment of an affirmative action program, adopted an affirmative action plan and appointed an affirmative action officer. (Copies of the City of Rochester public documents are submitted herewith as Appendix B.)

The recommendations of the Civil Service Task Force are based "...on the recognition of the need for a continuing planning, implementation and evaluation mechanism to assure that

the City of Rochester complies fully with the provisions of the Equal Opportunity Act of 1972." (Amendment to the Civil Rights Act of 1964 making the Act applicable to state and local governments). One of the specific undertakings the Task Force recognized was the reviewing and monitoring of "...all city contracts to assure that each contractor is in compliance with the City's Affirmative Action Guidelines for contractors."

When the City of Rochester by formal Resolution No. 75-10, February 11, 1975 adopted its first formal, affirmative action program it reaffirmed its obligations under law not to discriminate in employment and specifically its affirmative obligation to ensure that its contractors, lessors, vendors and suppliers do not discriminate in employment. In the introduction to the City's affirmative action program, Elisha C. Freedman, City Manager, defendant herein notes that:

"...extensive Federal, State and local legislation, several Presidential Executive Orders, as well as a number of landmark Supreme Court decisions, all... [mandate] that employers take positive action to eliminate employment discrimination based on race, color, sex, religion or national origin.

"Today, it is not enough for employers to merely pronounce that they are an 'equal opportunity employer'.

"The time has come for employers to fairly examine their employment systems and ferret out invidious barriers to equal employment opportunities for minorities and women. To achieve this end, aggressive, on-going

affirmative action is needed.

"The City of Rochester is committed to the philosophy of Affirmative Action and to achieving fair and equitable employment practices and procedures.

"What we have outlined in this plan are necessary steps toward insuring that all persons, regardless of race, color, sex, religion, or national origin, will have equal employment opportunity in City government. However, this plan is only the beginning, and to think that because we have this plan our job is done would be to delude ourselves. Our work is before us. Our goals and objectives will only be realized through our tenacious efforts and firm commitment to Affirmative Action."

Section XV deals with contract compliance and provides that:

"All City contractors, lessors, vendors, and suppliers will be sent copies of the City's Affirmative Action policy statement. The City will include non-discrimination clauses in all bid documents, contracts, and leases. Contractors, lessors, vendors and suppliers shall agree to comply with all state and federal equal employment opportunity laws and regulations, and shall submit documentation regarding equal opportunity and affirmative action as required or requested by the City. The City will give preference in the award of all contracts and leases to contractors, lessors, vendors and suppliers who have or participate in a written Affirmative Action Plan, wherever such preference is legal and feasible."

In Section I the City of Rochester underscores its policy of meeting its "...responsibility of equal employment opportunity for all persons regardless of race, color, sex,

religion and national origin," and notes that the "...City recognizes its moral and legal obligations to take affirmative and decisive action to improve employment opportunities for minorities and women who have historically been discriminated against in their quest for economic security and human dignity." The City Affirmative Action Officer, among other duties, is required in Section IV C to provide "...staff assistance to other City staff in pursuing compliance of City contractors with Affirmative Action requirements."

Another source of the City's obligation to ensure equal employment opportunities, including insuring that its contractors and subcontractors provide equal employment opportunities is, as defendant Freedman noted in his preface to the Affirmative Action Plan, Executive Order 11246, as amended and the regulations adopted thereunder. 3 CFR 339; 41 CFR 101-1.1 et seq. By Section 60-1.4(a)(7) a government contractor is required to place all terms and conditions of its contracts with the federal government in its contracts with subcontractors "...so that such provisions will be binding upon each subcontractor or vendor."

If federal monies given to a state or local government would be described as a grant-in-aid rather than a contract, the state or local government is nevertheless bound to equal employment policies and affirmative action. 45 CFR 70.4; United States v. Frazer, 297 F.Supp. 319 (M.D. Ala. 1968).

The City of Rochester receives money under the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing Act). The statute provides that no person on the ground of race, color, national origin, or sex shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available by Revenue Sharing. 31 U.S.C. §1242 and Regulations adopted pursuant thereto, 31 CFR 51.32. In upholding the enjoining of further revenue sharing grants to the City of Chicago, the court in United States v. Chicago, 395 F. Supp. 329 (N.D. Ill. 1975), 9 EPD 110,085, noted that the Revenue Sharing Act is unequivocal in barring use of federal funds in aid of discrimination and underscored that the constitution and federal law imposes upon officials not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police operations and prevent discrimination.

The City of Rochester also receives funds pursuant to the Omnibus Crime Control and Safe Streets Act of 1968. This federal law also specifically provides that there shall be no discrimination practiced by the local agency receiving such funds. 42 U.S.C. §3757. The regulations, 28 CFR 42.201-42.308, require/ ^{not only} that the local government itself guarantee equal employment opportunities but that it obtain guarantees of equal employment opportunities from the local government's sub-grantees, contractors,

or subcontractors as a condition of the extension of federal financial assistance to them. 28 CFR §42.204(a)(1).

While the defendants have asserted that the lease-contract involves no expenditure of "public funds", plaintiffs have disputed this contention. Defendants refuse to appear for depositions and produce documents pursuant to notices duly served. Plaintiffs have thus far been prevented from examining the defendants as to the expenditure of public monies in the lease-contract arrangement; plaintiffs have been prevented from examining the documents which could establish such expenditures. (A 129, 130, 181-188)

This court has noted the obvious impact of a government's ignoring its affirmative duties to administer its expenditures so as not to encourage discrimination. Evans v. Lynn, ___ F.2d ___ (2nd Cir. 1975), Docket No. 74-1793, decided June 2, 1975. The court found a "statutory right" to have programs and activities relating to housing and urban development administered in furtherance of the nation's fair housing policy. The court found that:

"Allocation of grants without assessing their impact on integration not only may maintain the status quo of living patterns, resulting in injury to those who must continue to live in ghettos, but may also increase the disparity between living styles by supporting 'white enclaves' while diverting funds which otherwise would have been used to alleviate ghettoization." Slip opinion at 3898.

Or as the court noted in NAACP, Western Region v. Brennan, 360 F.Supp. 1006 (D.C.D.C. 1973), statutes (referring to Title VI of the Civil Rights Act of 1964) requiring non-discrimination in government contracts implement "...fundamental Fifth and Fourteenth Amendment prohibitions on government support for institutions which practice... discrimination." These statutes and the Constitution impose upon government officials not only the duty to refrain from participating in discriminatory practices but the affirmative duty to police operations of and prevent discrimination by entities funded by them. NAACP, Western Region v. Brennan, supra at 1012.

There is no basis in fact or in law for the lower court's conclusion that, "Neither Title 7 of the Civil Rights Act nor the regulations of the Law Enforcement Assistance Administration have any application to the lease agreement." (A 266) Plaintiffs state claims against defendants Freedman and Ryan under the Constitution, 42 U.S.C. §§1983, 1985.

N.O.W. and Blowers separately state claims against all defendants that the lease-contract is void since it was not executed in compliance with New York State law, City of Rochester Code, and the public policy of the State of New York and the City of Rochester. Plaintiffs claim that the lease-contract is void because it was not executed as required by Section 220-e of the Labor Law of the State of New York which prohibits execution of any public works contract unless there is made part of that

contract specific guarantee by the contractor to the public entity that the private entity has not discriminated, does not and will not discriminate in employment.

Further, plaintiffs claim that there was no competitive bidding, the lease-contract was not approved by the City of Rochester Comptroller or Deputy Comptroller, the lease-contract was not approved by Rochester City Council - all as required by law. (See Rochester Municipal Code §§8A-3(B) and (D); 8A-6; 8A-7; 8A-9; 8A-13; 8A-17; Section 6.19; Section 6-5.)

The lease-contract agreement was executed in violation of the New York State public policy and the provisions of the Human Rights Law (Executive Law §§291-300) which guarantee the civil right of equal employment opportunities to all New York State citizens and apply to the City of Rochester. The lease-contract agreement violates Rochester City Council resolution 71-54, April 27, 1971, which endorses the enactment of the Human Rights Law prohibiting discrimination against women in employment. And, as previously noted, the lease-contract violates Rochester City Council resolution 75-10, February 11, 1975 which reaffirmed the City's legal obligations not to discriminate in employment and to assure affirmatively that none of its contractors, lessors, vendors, or suppliers discriminate.

Since plaintiffs' federal and state claims "derive from a common nucleus of operative fact and since it would ordinarily be expected that the claims would be tried together,

this court has pendent jurisdiction of plaintiffs' claims that the lease-contract is void under New York State law, regulations and public policy. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Kletschka v. Driver, 411 F.2d 436 (2nd. Cir. 1969).

Defendants Freedman and Ryan make no serious argument that any of these provisions in law or policy have been followed in the execution of the lease-contract. The lease-contract plainly does not contain the representations required pursuant to Section 220-e of the New York State Labor Law. Lawyers Cooperative indeed could not have made such a representation in view of the existent employment discrimination.

None of the formal approvals necessary to the execution of a municipal contract were even sought because, defendants Freedman and Ryan argue, this transaction was unique - the formal action or approvals were "not required." At most, defendant Freedman discussed the transaction "informally with members of the City Council." (A 117)

The court below erred therefore in ruling that it lacks "...pendent jurisdiction over the plaintiffs' claims founded entirely on New York Law." (A 266)

B. THE PLAINTIFFS STATE A CLAIM AGAINST DEFENDANTS GOSNELL AND LAWYERS COOPERATIVE PUBLISHING COMPANY.

Notwithstanding that defendants Gosnell and Lawyers Cooperative Publishing Company are private entities, they are liable to the plaintiffs. N.O.W. and Blowers allege that defendants Gosnell and Lawyers Cooperative Publishing Company have conspired, that is, they have taken acts in concert for the purpose of depriving the plaintiffs, both directly and indirectly, of equal protection of the laws and immunities under the laws. These defendants are liable to the plaintiffs by virtue of the provisions of 42 U.S.C. §§1983 and 1985.

Indeed, it is an anomaly for defendants Gosnell and Lawyers Cooperative Publishing Company to have argued that there is no jurisdiction over the claims against them. These defendants in their answer have admitted allegation numbered "33" of the complaint wherein plaintiffs assert that the court has jurisdiction pursuant to 42 U.S.C. §§1983 and 1985. (A15, 155)

Private persons or entities who act in concert to interfere, either directly or indirectly, with any other citizen's rights to equal protection of the laws or rights to privileges and immunities under the law are liable pursuant to 42 U.S.C. §1985. Griffin v. Breckenridge, 403 U.S. 88 (1971). There need be no proof that the alleged illegal action is taken "under color of law". Section 1985 is directed primarily at conspiracies of private persons to interfere with the rights of persons secured

by the Fifth and Fourteenth Amendments as well as other constitutional and statutory rights. There is no necessity to allege or show state action or involvement. Griffin v. Breckenridge, *supra*; Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971); Spampinato v. Breger & Co., 270 F.2d 46 (2d Cir. 1959); Mullarkey v. Borglum, 323 F.Supp. 1218 (S.D.N.Y. 1970).

Section 1985 (3) of Title 42 provides, in part:

"If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . ., in any case of conspiracy set forth in this section, if one or more persons engaged, therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." (Emphasis added.)

In Griffin v. Breckenridge, *supra*, the court found the defendants, all private individuals, liable to the plaintiffs for violation of 42 U.S.C. §1985 (3). The court held that plaintiffs' allegations that the defendants acted in concert to block passage of plaintiffs' automobile on the highway stated a claim of denial of equal protection of the law and denial of equal enjoyment of the privileges and immunities of the laws. The court

found that a claim is stated under 42 U.S.C. §1985 (3) when there is allegation of "...class-based invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at deprivation of the equal enjoyment of rights secured by the law to all." Griffin v. Breckenridge, supra at 102, 91 S.Ct. at 1798.¹

In a case analogous to the present case because it arises out of plaintiff's allegations against private parties that the private parties are liable because they have conspired, that is, acted in concert to deprive, directly or indirectly, plaintiffs of employment opportunities, Byrd v. Local Union No. 24 International Brotherhood of Electrical Workers, 375 F.Supp. 545 (D. Md. 1974), the court denied defendants' motion to dismiss. Noting that the test for sufficiency of a Section 1985(3) complaint set forth by the Supreme Court in Griffin v. Breckenridge, supra, is that the alleged conspiracy "...must aim at a deprivation of equal enjoyment of rights secured by the law to all," Griffin v. Breckenridge, supra at 102, 91 S.Ct. at 1798, the court found the complaint sufficient. See also Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974) where the court held a complaint against private defendants brought pursuant to 42 U.S.C. §1985(3)

¹ The court underscored that, with reference to intent to discriminate, there is no requirement of willful or specific intent. Griffin v. Breckenridge, supra at 102, 91 S.Ct. at 1798. Footnote 10.

Following Griffin v. Breckenridge, courts have rejected "specific intent" as an element of a §1985(3) claim, Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972).

and alleging construction of a barricade across a street to deprive plaintiffs (black landowners) of convenient access to downtown to be sufficient.

Plaintiffs claim here that the defendants have acted in concert to deprive them not only of equal protection of the laws but of equal privileges and immunities under the laws. The overt acts of defendants Gosnell and Lawyers Cooperative Publishing Company are even more egregious than the acts noted in the cases above because they were taken with defendants Freedman and Ryan, purportedly acting to bind the City of Rochester and purportedly acting on behalf of the City of Rochester. Plaintiffs as citizens have a right of action against those private parties who act in concert to place the power, prestige, property, material, influence or money to foster or promote, directly or indirectly, discrimination in employment. Defendants Gosnell and Lawyers Cooperative Publishing Company may not, pursuant to Title VII of the Civil Rights Act of 1964, discriminate in any term, condition or privilege of employment on the basis of sex, race, creed, color or national origin. Nor can defendants Gosnell and Lawyers Cooperative Publishing Company conspire, that is, take acts in concert to deny or interfere with those rights to equal employment opportunities. Defendants Gosnell and Lawyers Cooperative Publishing Company have not only taken those acts but those acts are memorialized in the lease-contract agreement for the perpetual lease of the Mercury statue.

Further, the fact that defendants Gosnell and Lawyers Cooperative Publishing Company have conspired, that is, acted in concert with defendants Freedman and Ryan, purportedly acting on behalf of the City of Rochester, and purportedly acting to bind the City of Rochester does give basis to plaintiffs' claim under 42 U.S.C. §1983. Wherever there is even minimal participation between a public official and a private party in a conspiracy, the private party is liable under 42 U.S.C. §1983. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) was a Section 1983 action brought solely against a dime store chain by a white woman who alleged that the dime store chain refused to serve her lunch because she was in the company of negroes. The court found:

"Although this is a lawsuit against a private party, not the state or one of its officials, our cases make clear that petitioner would have made out a violation of her Fourteenth Amendment rights and would be entitled to relief under §1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store or to cause her subsequent arrest because she was a white person in the company of Negroes.

The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; Monroe v. Pape [365 U.S. 167, 184, 187, 81 S.Ct. 473, 482, 484, 5 L.Ed. 2d 492 (1961)].... Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable

under §1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,' United States v. Price, 383 U.S., at 94, 86 S.Ct., at 1157." Adickes v. S.H. Kress & Co., *supra* at 152, 90 S.Ct. at 1605, 1606. (Citations omitted.)

Similarly, in Jennings v. Patterson, *supra*, the court found not only a §1985(3) claim but a §1983 claim. The court viewed the city's failure to remove a barricade from a street which should have been open to the public to be a circumstance of inaction which aided the blocking of the street by the private defendants.

The acts of defendants Gosnell and Lawyers Cooperative Publishing Company in concert with defendants Freedman and Ryan are akin to the lease of commercial space in a parking garage by the Wilmington Parking Authority to a restaurant which refused service to blacks. Burton v. Wilmington Parking Authority, 365 U.S. 721 (1961). While the lease between the governmental entity and the restaurant had been negotiated at arm's length and after public bids, the court found that

"...no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be....By its inaction the Authority, and through it the State, has not only made itself a party to the refusal of service, but

has elected to place its power, property and prestige behind the admitted discrimination." Burton v. Wilmington Parking Authority, supra at 725.

The defendants here have acted together not merely to lease commercial space; here the defendants have leased the identity of the city, a public symbol, a public treasure and made a landmark of a private building. In contrast to the circumstances in Burton v. Wilmington Parking Authority, supra, the transaction in question here was not negotiated at arm's length and after public bids, but rather, negotiations proceeded to conclusion in virtual secrecy with the City's elected public officials at most being informed only "informally" and most of them maintaining no knowledge of the transaction whatsoever until N.O.W. and its representative made complaint at a public meeting of the Rochester City Council.

See also State of Washington v. Baugh Construction Co., 313 F.Supp. 598 (W.D. Wash. 1969); Ethridge v. Rhodes, 268 F.Supp. 87 (S.D. Ohio 1967); Todd v. Joint Apprenticeship Com. of Steel Wkrs. of Chicago, 223 F.Supp. 12 (N.D. Ill. 1963), vacated 332 F.2d 243 (7th Cir. 1964), cert. denied 380 U.S. 914 (1965).

As noted above, since plaintiffs' claims that the lease-contract is void in violation of state and City of Rochester laws, regulations and public policy, grow out of the same fact situation as the federal claims, and would necessarily be tried in one lawsuit, this court has pendent jurisdiction of those claims.

The court below therefore erred in dismissing plaintiffs' claims against defendants Gosnell and Lawyers Cooperative Publishing Company.

C. THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT WHEN ALL MATERIAL FACTS IN ISSUE BETWEEN THE PARTIES ARE IN DISPUTE AND IN FAILING TO PERMIT PLAINTIFFS' DISCOVERY PRIOR TO RULING ON DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

Other than the admission that there is a lease-contract between the defendants for the perpetual lease of the Mercury statue for public display on Lawyers Cooperative Publishing Company private property, every material issue of fact between the parties is in dispute. Plaintiffs allege that Lawyers Cooperative Publishing Company has engaged in and is engaging in a policy, practice, custom and usage of discriminating against its female employees solely because of their sex with respect to compensation, terms, conditions and privileges of employment and that it limits, segregates and classifies its female employees, solely on the basis of sex, in ways which deprive, and have deprived female employees of equal employment opportunities. Defendants Gosnell and Lawyers Cooperative Publishing Company deny the allegations. (As previously noted, defendants Freedman and Ryan defaulted in answering herein.) Further, all material facts surrounding the execution and performance of the lease-contract are in dispute. All defendants have alleged in general terms that the lease-contract has involved expenditure of "no public funds." Plaintiffs dispute

these allegations. (A184-186, 192, 193)

Defendants Gosnell and Lawyers Cooperative Publishing Company directly dispute all the facts surrounding the course of investigation and findings on charges of employment discrimination against them to date. For example, (1) plaintiffs allege that Lawyers Cooperative Publishing Company refused to take corrective action directed by the New York State Division of Human Rights in its conciliation efforts incidental to investigation of discrimination complaints; defendants deny; (2) plaintiffs allege that the Equal Employment Opportunity Commission has reviewed their charges of discrimination against Lawyers Cooperative Publishing Company and found substance to those charges; defendants deny; (3) plaintiffs allege that the Defense Supply Agency, investigating a complaint of company-wide, class-wide employment discrimination filed by N.O.W., found such discrimination and made a finding of non-compliance; defendants allege that no court or administrative agency has ever made a determination that Lawyers Cooperative Publishing Company has discriminated and is discriminating; (4) plaintiffs allege that the Defense Supply Agency has conducted compliance reviews at Lawyers Cooperative Publishing Company and found discrimination and that the current compliance review is in suspension because of difficulty of the federal government agency receiving cooperation from Lawyers Cooperative Publishing Company in supplying documents; defendants maintain that the Defense Supply Agency did not find discrimination; (5) plaintiffs maintain

that Lawyers Cooperative Publishing Company Affirmative Action Programs directly support their contentions of company-wide, class-wide discrimination and that Lawyers Cooperative Publishing Company was found in non-compliance with federal anti-discriminatory regulations and issued a letter to show cause why its contracts should not be terminated because of the insufficiency of the Affirmative Action Programs; defendants maintain that there never has been any discrimination found at Lawyers Cooperative Publishing Company by any court or administrative agency and that their Affirmative Action Programs have always been "accepted"; (6) plaintiffs maintain that Lawyers Cooperative Publishing Company in order to resolve the show cause letter of the Defense Supply Agency based on the findings of discrimination against Lawyers Cooperative Publishing Company and to thereby prevent imposition of the ultimate sanction, debarring of contracts, undertook to obligate itself to initiate a complete review of each job description and the salary for each employee; defendants maintain that there never has been any finding by the Defense Supply Agency, any court or any other governmental or administrative agency and that its two-year study of its job classifications and salary structure was a part of the company's "compliance efforts under the federal discrimination laws." (A186, 187, 193-195)

There can be no summary judgment when material facts are in dispute. As this court noted in Doehler Metal Furniture Co., Inc. v. United States, 149 F.2d 130 (2nd Cir. 1945):

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But although prompt dispatch of judicial business is a virtue, it is neither the sole or the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. Doehler Metal Furniture Co., Inc. v. United States, supra at 135.

See generally, Moore's Federal Practice, Volume 6, ¶56.15[3].

This court has even held that it is error for a district court to grant a motion to dismiss without an evidentiary hearing when the facts as to the preliminary jurisdictional question are in dispute. Monteiro v. San Nicolas, S.A., 254 F.2d 514 (2nd Cir. 1958).

Further, the court erred in denying plaintiffs' motion to vacate stay of discovery of the defendant, and to compel disclosure prior to its ruling on the motions to dismiss and for summary judgment. Plaintiffs expeditiously noticed the deposition of defendant Freedman, requesting also the production of documents on November 29, 1974. By counsel, defendant Freedman recognized his obligation to appear for depositions and produce documents, maintaining only that the dates originally noticed were inconvenient to him. Counsel for plaintiffs accommodated defendant Freedman's schedule and arranged for his deposition on dates convenient to

him. Commitments were made on behalf of defendant Freedman for the production of the documents. (A182, 183, 188-190)

Notwithstanding that defendants Freedman and Ryan are in default, the lower court judge, by Order To Show Cause dated December 16, 1974, granted them a stay of the deposition of defendant Freedman and set argument dates for motions to dismiss and for summary judgment. In opposing this procedure, plaintiffs noted that they should not only be allowed to complete the deposition of defendant Freedman and examine the documents previously requested, but they should be allowed, at a minimum, to take the deposition of agent of defendants Gosnell and Lawyers Cooperative Publishing Company, Donald S. Bennett, examine documents of Lawyers Cooperative Publishing Company and have Lawyers Cooperative Publishing Company answer interrogatories. Plaintiffs maintain that they are entitled to the information from such discovery in defending against a summary judgment motion. (A182, 188, 195)

Denial of discovery may be ground for reversing a case after full trial with the opportunity for testimony. Roeb-ling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958). It is certainly error for a court to deny discovery at the initial stages of litigation and where that discovery will provide information in defending against a motion to dismiss or motion for summary judgment. Smith-Corona Marchant, Inc. v. American Photocopy Equip. Co., 217 F.Supp. 39 (S.D.N.Y. 1963); Dombrovskis v. Esperdy.

185 F.Supp. 478 (S.D.N.Y. 1960); Hummel v. Riordon, 56 F.Supp. 983 (N.D.Ill. 1944).

POINT II

THE COURT BELOW ERRED IN DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION WITHOUT HEARING AND WITHOUT AFFORDING OPPORTUNITY TO BE HEARD.

With the filing of their complaint, N.O.W. and Blowers, on November 7, 1974, asked that the district court grant a temporary restraining order enjoining the defendants from further performance of the lease-contract and that the court set an immediate date for the defendants to respond to the plaintiffs' application for preliminary injunction. The court below denied the application for temporary restraining order but ordered the defendants to show cause why a preliminary injunction should not be entered on November 11, 1974. (A76-81)

Plaintiffs moved immediately upon the announcement of Lawyers Cooperative Publishing Company of October 31, 1974 of plans for the public display of the statue. Upon plaintiffs' first having heard of some "arrangement" between the defendants for the public display of the statue by news reports beginning sometime April, 1974, plaintiffs had sought information from City of Rochester officials or their aides. Those inquiries were not at all successful until N.O.W. and its representative made formal protest at a public meeting of the Rochester City Council on August 13, 1974. Plain-

tiffs were thereafter led to believe that the lease-contract arrangement was under review in light of their complaints. (A8-12)

Plaintiffs' application for preliminary injunction was supported by the verified complaint of the parties plus affidavits of the parties with supporting exhibits. The exhibits included documents obtained from the defendant Lawyers Cooperative Publishing Company in Blowers, individually and on behalf of all other persons similarly situated v. Lawyers Cooperative Publishing Company, et al, Civil Action No. 1973-47. These documents contain admissions of the Company's discriminatory employment practices. Reference was also made in the papers to sworn testimony and documents in the Blowers litigation wherein the federal government contract compliance officer describes the course of his investigation of employment discrimination at the Company and summarizes his findings of discrimination. (A3-115)

Plaintiffs underscored in their application that all tests for the granting of the preliminary injunction were met. Immediate irreparable injury would flow from the denial of the injunction. If the lease-contract were allowed to proceed, the defendants would proceed with the permanent display of the public property on its private property. The City of Rochester would thereby align itself in the most prominent fashion possible with the image and policies of Lawyers Cooperative Publishing Company, including, of course, the company's illegal employment practices. There would be no way in which money damages could adequately re-

pay the harm to the plaintiffs' rights to have the City of Rochester not only refrain from aiding discrimination, directly or indirectly, but affirmatively assuring that none of its contractors or subcontractors discriminate-with the public treasure, Mercury statue, on daily display in the heart of the city on Lawyers Cooperative Publishing Company private property.

The balance of convenience or hardship between the parties weighed in favor of the plaintiffs. The statue had been in storage since 1951; the time involved in deciding the lawsuit would not be substantial, additional delay. The success of plaintiffs' lawsuit was assured because of the clear evidence of Lawyers Cooperative Publishing Company employment discrimination available.

Plaintiffs, in the traditional use of the preliminary injunction, were merely asking that the court preserve the status quo between the parties pending final determination of the action. Unicon Management Corp. v. Koppers Co., 366 F.2d 199 (2nd Cir. 1966). See also Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2nd Cir. 1953) where the court found that an injunction should be granted "to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began."

By the time the hearing on the application for preliminary injunction was scheduled to be heard, November 11, 1974, none of the defendants had yet filed or served any opposition to

the application. The court heard counsel for the plaintiffs and counsel for the defendants argue briefly in support of and in opposition to the application. Attorneys for defendants requested time in which to submit written opposition. The court granted the defendants until the morning of November 12, 1974 to submit such opposition, commenting that it would decide at that time whether testimony was necessary.

The defendants did not in fact file any opposition papers until late afternoon on November 12, 1974. Plaintiffs immediately sought permission to and filed further papers in support of the application. As plaintiffs noted in their papers, except for the existence of the lease-contract, all material facts between the parties are in dispute. Nevertheless, without further proceedings, the court on November 14, 1974 denied plaintiffs' application. (A145-149)

When material issues of fact are in dispute on an application for preliminary injunction, such injunction may not be granted or denied without there being an evidentiary hearing held by the court. As the court observed in Sims v. Greene, 161 F.2d 87 (3d Cir. 1947):

"....The allegations of the pleadings and affidavits filed in the cause are conflicting. Such conflicts must be resolved by oral testimony since only by hearing the witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations made by the respective parties. If witnesses are

not heard the trial court will be left in the position of preferring one piece of paper to another. Greene was given no opportunity to present oral testimony on his behalf except for one witness whose testimony was immaterial to any issue presented by the pleading....

* * * * *

The issuance of a preliminary injunction under such circumstances is contrary not only to the Rules of Civil Procedure but also to the spirit which imbues our judicial tribunals prohibiting decision without hearing. Rule 65(a) provides that no preliminary injunction shall be issued without notice to the adverse party. Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy....

* * * * *

....The conclusion is inescapable that since a district court is required by the rule to make findings of fact, the findings must be based on something more than a one-sided presentation of the evidence. Finding facts requires the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy alone, but by both. A helpful analogy is supplied by the Pennsylvania law. See *Varzaly v. Yuhasz*, 128 Pa. Super. 314, 318, 193 A.63. It is appropriate to point out also that after evidence has been presented by both sides an opportunity must also be afforded to both sides to argue the effect of that evidence to the court...." (Footnotes omitted.) *Sims v. Greene*, *supra* at 88, 89.

This court in *SEC v. Great American Industries, Inc.*, 407 F.2d 453 (2d Cir. 1968); cert. denied 395 U.S. 920 (1969), has noted that it condemns the disposition of motions for prelim-

inary injunction on the basis of affidavits even where that procedure might be acquiesced in by all parties. See also SEC v. Frank, 388 F.2d 486 (2nd Cir. 1968).

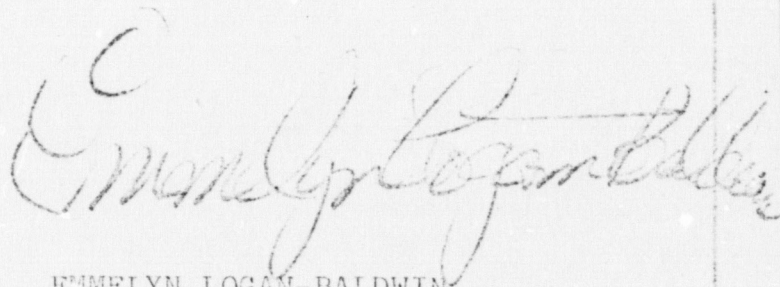
The court should reverse the lower court's denial of preliminary injunction, remanding that question for further appropriate proceedings. Plaintiffs are still entitled to the cessation of the City's daily showing of support for the discriminatory practices of Lawyers Cooperative Publishing Company through the prominent display of the symbol of the City on the Lawyers Cooperative Publishing Company building. Since defendants Gosnell and Lawyers Cooperative Publishing Company represented to the lower court that the statue "...could easily be removed from its pedestal tower," the granting of the preliminary injunction is not only feasible but dictated under the facts and the law. (A120)

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the court reverse the lower court's dismissal of the complaint herein and its granting of summary judgment. Plaintiffs request that this court find plaintiffs' complaint as to all counts and as to all defendants sufficient as a matter of law, that the court remand this case directing that plaintiffs be given full opportunity under the Federal Rules of Civil Procedure for appropriate discovery, that the court direct further proceedings on the application for preliminary injunction and the court direct that

there be a trial of the case on the merits.

Respectfully submitted,

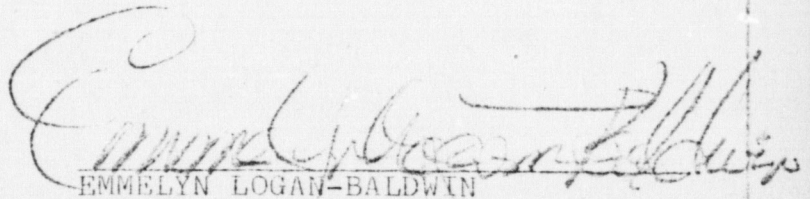
A handwritten signature in cursive script, appearing to read "Emmelyn Logan-Baldwin".

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September 2, 1975

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief of plaintiffs-appellants was served on defendants-appellees by my causing two copies thereof to be mailed to Louis N. Kash, Esquire, Corporation Counsel, City of Rochester, Joseph A. Regan, Esquire of Counsel, City Hall, Rochester, New York 14614 and two copies to be mailed to Nixon, Hargrave, Devans & Doyle, James Morgenstern, Esquire of Counsel, Lincoln First Tower, Rochester, New York 14604, attorneys for defendants-appellees this second day of September, 1975.



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September 2, 1975

APPENDIX A

Discrimination on Public Works Contracts

§ 26,100

Discrimination in employment on public works contracts on account of race, creed, color, sex or national origin is prohibited by Chapter 158, New York Laws of 1935, as last amended by Chapter 290, Laws of 1973 (Consolidated Laws of New York, Labor Law, Chapter 31, Article 8, Section 220-e).

Section 220-e. Provisions in contracts prohibiting discrimination on account of race, creed, color, sex or national origin in employment of citizens upon public works.

—Every contract for or on behalf of the state or a municipality for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies shall contain provisions by which the contractor with the state or municipality agrees:

(a) That in the hiring of employees for the performance of work under this contract or any subcontract hereunder, no contractor, subcontractor, nor any person acting on behalf of such contractor or subcontractor, shall by reason of race, creed, color, sex or national origin discriminate against any citizen of the state of New York who is qualified and available to perform the work to which the employment relates:

(b) That no contractor, subcontractor, nor any person on his behalf shall, in any manner, discriminate against or intimidate any employee hired for the performance of

work under this contract on account of race, creed, color, sex or national origin;

(c) That there may be deducted from the amount payable to the contractor by the state or municipality under this contract a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated in violation of the provisions of the contract;

(d) That this contract may be cancelled or terminated by the state or municipality, and all moneys due or to become due hereunder may be forfeited, for a second or any subsequent violation of the terms or conditions of this section of the contract; and

(e) The aforesaid provisions of this section covering every contract for or on behalf of the state or a municipality for the manufacture, sale or distribution of materials, equipment or supplies shall be limited to operations performed within the territorial limits of the state of New York. [§ 26,100 reads as amended by Ch. 290, L. 1973, effective May 8, 1973.]

Discrimination on Public Contracts

§ 26,101

Discrimination in employment on public contracts on account of race, creed, color, sex or national origin is covered by New York law (§ 26,100). A non-discrimination clause must be included in such contracts and contractors are required to give notice to labor unions if the employees are represented. Texts of the non-discrimination clause and the form of notice to unions are reproduced below.

EQUAL EMPLOYMENT OPPORTUNITY

Non-discrimination Clauses in New York Public Contracts

During the performance of this contract, the contractor agrees as follows:

(a) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and will take affirmative

action to insure that they are afforded equal employment opportunities without discrimination because of race, creed, color or national origin. Such action shall be taken with reference, but not be limited, to: recruitment, employment, job assignment,

promotion, upgrading, demotion, transfer, layoff or termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on-the-job training.

(b) The contractor will send to each labor union or representative of workers with which he has or is bound by a collective bargaining or other agreement or understanding, a notice, to be provided by the State Commission for Human Rights, advising such labor union or representative of the contractor's agreement under clauses (a) through (g) (hereinafter called "non-discrimination clauses"). If the contractor was directed to do so by the contracting agency as part of the bid or negotiation of this contract, the contractor shall request such labor union or representative to furnish him with a written statement that such labor union or representative will not discriminate because of race, creed, color or national origin and that such labor union or representative either will affirmatively cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of these non-discrimination clauses or that it consents and agrees that recruitment, employment and the terms and conditions of employment under this contract shall be in accordance with the purposes and provisions of these non-discrimination clauses. If such labor union or representative fails or refuses to comply with such a request that it furnish such a statement, the contractor shall promptly notify the State Commission for Human Rights of such failure or refusal.

(c) The contractor will post and keep posted in conspicuous places, available to employees and applicants for employment, notices to be provided by the State Commission for Human Rights setting forth the substance of the provisions of clauses (a) and (b) and such provisions of the State's laws against discrimination as the State Commission for Human Rights shall determine.

(d) The contractor will state, in all solicitations or advertisements for employees placed by or on behalf of the contractor, that all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color or national origin.

(e) The contractor will comply with the provisions of Sections 291-299 of the Executive Law and the Civil Rights Law, will

furnish all information and reports deemed necessary by the State Commission for Human Rights under these non-discrimination clauses and such sections of the Executive Law, and will permit access to his books, records and accounts by the State Commission for Human Rights, the Attorney General and the Industrial Commissioner for the purposes of investigation to ascertain compliance with these non-discrimination clauses and such sections of the Executive Law and Civil Rights Law.

(f) This contract may be forthwith canceled, terminated or suspended, in whole or in part, by the contracting agency upon the basis of a finding made by the State Commission for Human Rights that the contractor has not complied with these non-discrimination clauses, and the contractor may be declared ineligible for future contracts made by or on behalf of the State or a public authority or agency of the State, until he satisfies the State Commission for Human Rights that he has established and is carrying out a program in conformity with the provisions of these non-discrimination clauses. Such finding shall be made by the State Commission for Human Rights after conciliation efforts by the Commission have failed to achieve compliance with these non-discrimination clauses and after a verified complaint has been filed with the Commission, notice thereof has been given to the contractor and an opportunity has been afforded him to be heard publicly before three members of the Commission. Such sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided by law.

(g) The contractor will include the provisions of clauses (a) through (f) in every subcontract or purchase order in such a manner that such provisions will be binding upon each subcontractor or vendor as to operations to be performed within the State of New York. The contractor will take such action in enforcing such provisions of such subcontract or purchase order as the contracting agency may direct, including sanctions or remedies for non-compliance. If the contractor becomes involved in or is threatened with litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor shall promptly so notify the Attorney General, requesting him to intervene and protect the interests of the State of New York.

Chapter 8A

PURCHASING AND PROPERTY MANAGEMENT

- § 8A-1. Declaration of policy.
- § 8A-2. Definitions.
- § 8A-3. Purchasing Agent; powers and duties.
- § 8A-4. Requisitions and estimates.
- § 8A-5. Encumbrance of funds.
- § 8A-6. Competitive bidding required for purchases.
- § 8A-7. Formal contract procedure.
- § 8A-8. Open market procedure for purchases and sales.
- § 8A-9. Negotiated contracts.
- § 8A-10. Performance and payment security.
- § 8A-11. Storerooms.
- § 8A-12. Emergency purchases.
- § 8A-13. Inspections and testing.
- § 8A-14. Cooperative purchasing.
- § 8A-15. Excess property.
- § 8A-16. Exchange of surplus property.
- § 8A-17. Disposal of surplus property.

[HISTORY: Adopted Rochester City Council 8-8-72 as Ord. 72-423. Amendments noted where applicable.]

§ 8A-1. Declaration of policy.

It is the intent of the City Council in enacting this Purchasing and Property Management Chapter to provide for the city an

economical and efficient system for the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, specifications, property identification and classification, repairing and converting, establishment of inventory levels, and establishment of forms and procedures; the utilization of available property; the disposal of surplus property; and records management.

§ 8A-2. Definitions.

As used in this chapter, the following terms shall have the meaning given herein. When not inconsistent with the context, words in the singular number include the plural, words in the plural number include the singular, and words in the present tense include the future.

AGENCY HEADS — The head or the deputy head of any city department, agency or commission, and shall mean the head or the deputy head of any bureau reporting directly to the City Manager.

CITY — The City of Rochester, New York.

CITY COUNCIL or COUNCIL — The Council of the City of Rochester.

CONTRACTS — All types of agreements and orders for the procurement or sale of supplies or services. It includes awards, notices of award, letter contract, purchase orders, leases, rentals and bills of sale.

CONTRACTUAL SERVICES — All public works including the construction, repair and maintenance of buildings, roadways, equipment, machinery and other city-owned real and personal property, and also means all telephone, gas, water, electric light, power, cleaning, and similar services. The term shall not include professional or other personal services which are in their nature unique and not subject to competition.

EXCESS PROPERTY — Any property under the control of any using agency which is not required for its needs and the discharge of its responsibilities as determined by the head thereof.

INVITATION FOR BIDS — Includes the advertisement for bids and all of the proposed contract documents, including any plans and specifications, instructions to bidders, proposals, contract agreements and addenda thereto.

MINOR INFORMALITY or IRREGULARITY IN A BID — An informality or irregularity which is merely a matter of form and not of substance or which pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirements of the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. The defect or variation in the bid is immaterial and inconsequential when its significance as to price, quantity, quality or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured.

PERSON (and the masculine pronoun as used throughout this chapter) — Includes any individual, association, partnership, corporation, firm, trust, estate or other entity.

PURCHASING AGENT — The designated purchasing agent of the City of Rochester.

SUPPLIES — All supplies, materials and equipment and other personal property.

SURPLUS PROPERTY — Any excess personal property not required for the needs and the discharge of the responsibilities of all using agencies in the city government, as determined by the Purchasing Agent.

USING AGENCY — Any department, agency, commission, bureau, establishment or other unit in the city government which derives its support wholly or in part from the city and which uses supplies or procures contractual services.

§ 8A-3. Purchasing Agent; powers and duties.

- A. The County Purchasing Agent shall be the Purchasing Agent of the City of Rochester, and he shall have the powers and duties prescribed by law in this chapter, and

by any rules or regulations as may be prescribed by the City Manager.

- B. Scope of purchasing authority. The Purchasing Agent shall have the power and it shall be his duty to enter into purchase rental and lease contracts for supplies and to enter into contracts for public work and other contractual services, except professional and other personal services which are in their nature unique and not subject to competition, needed by any using agency in the city government and to sell surplus property and other personal property owned by the city.
- C. The Purchasing Agent shall assume charge and control of, and be responsible for, the general conduct of the business of his office and for the faithful discharge of the duties of his deputy and other persons under his direct supervision and control. Provided he remains so responsible, the Purchasing Agent may designate persons under his direct supervision and control to place orders for the purchase of supplies and contractual services.
- D. Except as herein provided and except for persons under the direct supervision and control of the Purchasing Agent, it shall be unlawful for any city officer or employee or any using agency to order the purchase of any supplies or make any contract within the purview of this chapter other than through the Purchasing Agent. Any purchase ordered or contract made contrary to the provisions hereof shall not be approved by the city officials, and the city shall not be bound thereby.
- E. Other powers and duties. In addition to the purchasing authority conferred in Subsection B of this section, and in addition to any other powers and duties conferred by this chapter, the Purchasing Agent shall:
- (1) Act to procure for the city the highest quality in supplies and contractual services at the least expense to the city.
 - (2) Seek to establish uniform specifications for the city, so that supplies and contractual services may be purchased in as large quantities as may be practicable.

- (3) Discourage uniform bidding and endeavor to obtain as full and open competition as possible on all purchases and sales.
- (4) Prescribe rules and regulations for the implementation of this chapter, including policies and methods relating to procurement of supplies and contractual services and related functions such as contracting, inspection, storage, issue, property identification and classification, and repairing and converting.
- (5) Prescribe and maintain such forms as he shall find reasonably necessary to the operation of this chapter.
- (6) Cooperate with the Department of Finance so as to secure for the city the maximum efficiency in budgeting and accounting.
- (7) Establish a bidder's list who shall be sent invitations to bid for commodities that are similar in character and ordinarily handled by the trade group to which the invitations are sent.

§ 8A-4. Requisitions and estimates.

- A. The Purchasing Agent shall have the power to require any using agency to file with him detailed estimates of its requirements for supplies and contractual services in such manner, at such times and for such future periods as he shall prescribe. A using agency shall not be prevented from filing, in the same manner, with the Purchasing Agent at any time a revised estimate for any supplies and contractual services, the need for which was not foreseen when the detailed estimates were filed.
- B. The Purchasing Agent shall examine each requisition or estimate and shall have the authority to return it for revision as to quantity, quality or estimated costs.

§ 8A-5. Encumbrance of funds.

Except in the event of a public emergency requiring immediate action which cannot await certification, the Purchasing Agent

shall not make any contract nor issue any order for delivery or performance on a contract unless it has been approved by the Comptroller or Deputy Comptroller of the city.

§ 8A-6. Competitive bidding required for purchases.

Except in an emergency and except as otherwise authorized by law, including any provision of the Charter or the Code of the city, where so required by Section 103 of the General Municipal Law of the State of New York, all contracts for contractual services involving an expenditure of more than two thousand five hundred dollars (\$2,500.) and all purchase contracts for supplies involving an expenditure of more than one thousand five hundred dollars (\$1,500.) shall be entered into pursuant to the formal contract procedure set forth in this chapter.

§ 8A-7. Formal contract procedure.

A. Specifications.

- (1) Unless the City Council shall have stated a need for standardization, all invitations for bid shall be based upon specifications which are definite and certain and which shall permit competition.
- (2) All invitations for bid shall be approved by the head of the using agency for which the contract is to be made and by such other departments of the city as may be designated by the City Manager.

B. Advertisement for bids.

- (1) Advertisement for bids shall be published by the Purchasing Agent once in at least one (1) official newspaper of the city. At least one (1) such publication shall be made on a day other than a Saturday, Sunday or public holiday. At least five (5) days shall elapse between the first publication of such advertisement and the date so specified for the opening and reading of bids. Such advertisement shall contain a general description of the supplies to be

purchased or sold or the contractual services to be procured, shall state where the invitation for bids, including bid forms and specifications, may be obtained, and shall contain a statement of the time when and place where all bids received pursuant to such notice will be publicly opened and read.

- (2) Bulletin board. The Purchasing Agent shall also publish all pending advertisements for bids by notices posted on a public bulletin board which he shall designate.

C. Bid security.

- (1) When deemed necessary by the Purchasing Agent, he shall prescribe a bid security of a certified check, money, bonds or other obligations as a condition precedent to the consideration of a bid. Such bid security shall be set forth in the invitation for bids. No bond shall be submitted to the city having as surety thereon, either as coinsurer or as reinsurer, any surety company not authorized to do business in the State of New York. All bid securities shall be subject to approval by the city as to form and sufficiency of surety.
- (2) The Purchasing Agent, after the bids have been opened, shall retain the bid security of the three (3) lowest bidders, and may in his discretion return the bid security of all other bidders. The Purchasing Agent shall also retain the bid securities of the three (3) lowest bidders for ten (10) days following an award of a contract, notwithstanding that such award shall be the first or any subsequent award. A bidder may withdraw his bid security not less than ten (10) days after an award of the contract within the time specified, or if no award of the contract be made, within forty-five (45) days after the date of opening bids therefore, whichever date is later, and upon such withdrawal his bid security shall be forthwith returned. The Purchasing Agent shall forthwith return all bid securities in the event all bids are rejected, and he may return any bid security which a bidder is entitled to withdraw.

- (3) A bidder shall forfeit any bid security required upon failure on his part to execute a contract in a form approved by the city and to furnish the required insurance and security within ten (10) days after the award, or within such other time as may be specified in the invitation for bids. A bidder shall be deemed to have failed to execute any contract upon failure on his part to provide or make available any materials or documents required to be so made by the invitation for bids or by law within ten (10) days after request therefor by the city, or within such other time as may be specified in the invitation for bids or by law.

D. Bid opening procedure. Bids shall be submitted in sealed envelopes to the Purchasing Agent and shall be identified as bids on the envelope. All bids shall be publicly opened and read at the time and place stated in the advertisement for bids. A tabulation of all bids received shall be prepared and made available for public inspection.

E. Rejection of bids. The Purchasing Agent is authorized to reject all bids or parts of all bids when the interests of the city will be served thereby. The Purchasing Agent may also reject any bid unless the bid contains an adequate and reasonable price for all items for which a bid is required.

F. Bid modifications and mistakes.

- (1) Late modification. A late modification of the otherwise successful bid shall be opened at any time it is received; and if in the judgment of the Purchasing Agent it makes the terms of the bid more favorable to the city, it shall be considered.
- (2) Minor informalities or irregularities in bids. The Purchasing Agent shall either give a bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive such deficiency, whichever is to the advantage of the city.
- (3) Mistakes in bids. Where a mistake in a bid is alleged prior to award and where the bid, as submitted, is responsive to the invitation for bids, the Purchasing

Agent, with the approval of the Corporation Counsel, may:

- (a) Determine that the bidder may withdraw his bid where the bidder requests permission to do so and clear and convincing evidence establishes the existence of a mistake, however, if the evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended, and if the bid, both as uncorrected and corrected, is the one most favorable to the city, the Purchasing Agent may correct the bid and not permit its withdrawal.
- (b) Determine that the bidder may correct his bid where the bidder requests permission to do so and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended; provided, that such correction shall not be made where it would result in displacing one (1) or more bids, unless the existence of the mistake and the bid actually intended as ascertainable substantially from the invitation and the bid itself.
- (4) When a determination is made concerning an alleged bid mistake, a full and complete statement of the reasons for making the determination shall be prepared by or under the direction of the Purchasing Agent, which statement shall be filed with the other papers relating to the transaction.
- (5) Unless the Purchasing Agent determines, as provided in this section, that a bid may be withdrawn or corrected, no plea of mistake in a bid shall be available to the bidder for the recovery of his bid security or as a defense to any action based upon such bid, except, with the approval of three-fourths (¾) of the City Council.

G. Award of contract.

- (1) The Purchasing Agent is authorized to award and execute contracts within the purview of this chapter

with the lowest responsible bidder whose proposal shall conform to the invitation for bids.

- (2) Determination of responsibility and nonresponsibility. No purchase shall be made from, and no contract shall be awarded to, any bidder unless the Comptroller first determines that the bidder is responsible. The bidder shall demonstrate affirmatively his responsibility, including, when necessary, that of his proposed subcontractors. Any failure by a bidder to supply or to make available any materials or documents required by the Comptroller or by any other officers of the city for the purpose of determining the bidder's responsibility shall subject the bidder to forfeiture of his bid security. In determining the responsibility of a bidder, the Comptroller shall consider:
- (a) The adequacy of the bidder's financial resources, or his ability to obtain such resources. The Comptroller may require that any bidder submit verified statements as to his financial responsibility and his experience, which statements shall be made on forms prescribed by the Comptroller. Supplemental statements may be required at any time.
 - (b) The ability of the bidder to comply with the required or proposed delivery or performance schedule.
 - (c) The record of performance of the bidder and any proposed subcontractors on other contracts, and particularly on similar contracts had with the city.
 - (d) The record of integrity of the bidder.
 - (e) The availability to the bidder of the necessary organization, experience, operational controls and technical skills, and the necessary production, construction and technical equipment and facilities required for performance of the contract.

- (f) The compliance by the bidder with any special or general standards of responsibility set forth in the invitation for bids.
 - (g) The compliance by the bidder with any other standards which may be established by the Comptroller pursuant to rule or regulation.
 - (h) No bidder shall be determined to be responsible who is in default on the payment of any taxes, licenses or other monies due the city, or who has defaulted within two (2) years for any reason on a contract had with the city.
- (3) The Comptroller, with the approval of the City Manager, may delegate all or any part of the authority and duties for the determination of responsibility and nonresponsibility set forth in Subsection (2) to the Purchasing Agent; provided such delegation is evidenced by a writing which is filed with the City Manager.
- (4) Award to other than low bidder. When the award is not given to the lowest bidder, a full and complete statement of the reasons for placing the award elsewhere shall be prepared by or under the direction of the Purchasing Agent, which statement shall be filed with the other papers relating to the transaction. When a bid is rejected because the bidder is found to be nonresponsible, the statement required by this section shall be approved by the City Manager.
- (5) Tie bids. In cases where two (2) or more responsible bidders furnishing the required security submit identical bids as to price, the Purchasing Agent may award the contract to any of such bidders.

H. Prohibition against subdivision. No contract, purchase or sale shall be subdivided to avoid the requirements of this section.

§ 8A-8. Open market procedure for purchases and sales.

All contracts for public work, and all purchase contracts, rentals and leases of supplies, and all sales of personal property of

the city which are required to be purchased or sold by the open market procedure may be made without newspaper advertisement and without observing the formal contract procedure. All open market purchases shall, wherever feasible, be based on at least three (3) competitive bids, and shall be awarded to the bidder who shall satisfy the Purchasing Agent as to his responsibility and whose bid is most advantageous to the city, price and other factors considered. All open-market sales shall be based on at least two (2) competitive bids, or if such bids cannot reasonably be obtained, on such other form of evaluation as the Purchasing Agent shall deem reasonable, and shall be awarded to the responsible bidder whose bid is most advantageous to the city, price and other factors considered. The Purchasing Agent shall solicit bids by such method or methods, including direct mail and telephone, as he shall deem suitable.

§ 8A-9. Negotiated contracts.

- A. Except as provided in Subsection B of this section, contracts negotiated on behalf of the City by the Purchasing Agent may be of any type which in the opinion of the Purchasing Agent will promote the best interests of the city. The Purchasing Agent shall determine that the method of contracting for a negotiated contract is likely to be less costly than other methods, that the prospective vendor is responsible, that the supplies or contractual services to be provided are of the kind and quality required by the city, and that the price is fair and reasonable.
- B. The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed fee contract, the fee shall not exceed fifteen percent (15%) of the estimated cost of the contract, exclusive of the fee, as determined by the Purchasing Agent at the time of entering into such contract. The Purchasing Agent, or his designate, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.
- C. All contracts negotiated pursuant to authority contained in this section shall include a clause to the effect that the

Purchasing Agent or his duly authorized representative shall until the expiration of three (3) years after final payment have access to and the right to examine any directly pertinent books, documents, papers and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Such clause may be omitted from contracts where the Purchasing Agent determines, after taking into account the price and availability of the property of services from other sources, that the public interest would be best served by the omission of such clause.

§ 8A-10. Performance and payment security.

- A. The Purchasing Agent shall have the authority to require on any and all contracts a performance bond for the faithful performance of the contract and a payment bond for the protection of all persons supplying labor and material in the prosecution of the work provided in the contract in such amounts as he shall find reasonably necessary to protect the best interests of the city. The Purchasing Agent shall require such performance and payment bonds having a penal sum at least equal to fifty percent (50%) of the total amount payable by the terms of the contract on all contracts for contractual services involving an expenditure of two thousand five hundred dollars (\$2,500.) or more. The Purchasing Agent may require such performance or payment bonds at any time, notwithstanding that the invitation for bids shall not specifically require performance or payment bonds.
- B. The Purchasing Agent or the Comptroller may require additional performance or payment bond protection in the event that a modification or aggregate of modifications to a contract may be expected to increase the contract price by fifty thousand dollars (\$50,000.) or twenty-five percent (25%) of the basic contract price, whichever is less, or if a modification is for new or additional work which is beyond the scope of the existing contract.
- C. Notwithstanding the provisions of Subsection A of this section, where the contract is not for the construction,

alteration or repair of any public building or other public work, the Purchasing Agent, with the approval of the Comptroller, may defer the filing and execution of a performance or payment bond, provided, that at least fifty percent (50%) of the contract price shall be withheld until acceptance of the work under the contract, and provided further, that the bid security shall be retained in lieu of all or any part of the performance and payment security. Upon completion and acceptance of such work, the Purchasing Agent may waive the execution and filing of the performance of payment bond.

- D. All bonds submitted pursuant to this section shall be subject to approval by the city as to form and sufficiency of surety. No bond shall be submitted to the city having as surety thereon, either as coinsurer or as reinsurer, any surety company not authorized to do business in the State of New York.

§ 8A-11. Storerooms.

Storerooms and storage places may be established by the Purchasing Agent to facilitate buying for future needs, in which case a store's revolving fund of a fixed amount shall be provided by the City Council. All such storerooms, storeplaces and stores therein contained shall be under the direction and control of the Purchasing Agent. The Purchasing Agent may arrange for the operation by any using agency of warehouses, supply centers, repair shops, fuel yards and other similar facilities.

§ 8A-12. Emergency purchases.

- A. By Purchasing Agent. In case of an apparent emergency which requires the immediate purchasing of supplies or contractual services, and with the approval of the City Manager, the Purchasing Agent may secure by open market procedure set forth in this chapter, at the lowest obtainable price, any supplies or contractual services regardless of the amount of the expenditure. A full report of the circumstances of an emergency purchase, including the dates upon which any officer or employee of the city

and the Purchasing Agent became aware of the need for the purchase and an explanation setting forth the reasons why the purchase was required to be made immediately, shall be filed by the Purchasing Agent with the Comptroller.

- B. By heads of using agencies. In the case of a public emergency requiring immediate action, and with the consent of the Purchasing Agent and with the approval of the City Manager, the head of any using agency may purchase directly any supplies whose immediate procurement is essential to protect the life, health, safety or property of the inhabitants of the city. The Purchasing Agent shall prescribe by rules and regulations the procedure under which emergency purchases by heads of using agencies may be made. The head of such using agency shall send to the Purchasing Agent a requisition and a copy of the delivery record together with a full written report of the circumstances of the emergency, which report shall conform to the requirements of and shall be filed in the manner provided in Subsection A of this section.

-13. Inspections and testing.

- A. The Purchasing Agent shall inspect, or supervise the inspection of, all deliveries of supplies or contractual services to determine their conformance with the specifications set forth in the order or contract.
- B. The Purchasing Agent may authorize using agencies having the staff and facilities for adequate inspection to inspect all deliveries made to such using agencies under such rules and regulations as the Purchasing Agent may prescribe.
- C. The Purchasing Agent is authorized in his discretion to require chemical, physical or other tests of samples submitted with bids and samples of deliveries to determine their quality and conformance with the specifications. In the performance of such tests, the Purchasing Agent shall have the authority to make use of the laboratory and other testing facilities of any agency of the city government and of any outside laboratory.

§ 8A-14. Cooperative purchasing.

The City Manager shall have the authority to join with other units of government in cooperative purchasing plans when the best interests of the city would be served thereby.

§ 8A-15. Excess property.

- A. Reports. All using agencies shall submit to the Purchasing Agent at such times and in such form as he shall prescribe reports showing all excess property under the control of such using agency.
- B. The Purchasing Agent is authorized to transfer excess property to other using agencies.

§ 8A-16. Exchange of surplus property.

In acquiring personal property, the Purchasing Agent may exchange or sell similar items with the approval of the head of the using agency in which said items may be located, and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment for the property acquired; provided, that any transaction carried out under the authority of this section shall be evidenced in writing.

(§ 8A-17. Disposal of surplus property.

- A. The Purchasing Agent shall have supervision and direction over the disposition of surplus property. The Purchasing Agent is authorized to dispose of surplus property by sale, exchange, lease, permit or transfer, for cash, credit or other property, with or without warranty, and upon such other terms and conditions as the Purchasing Agent deems proper, and he may execute such documents for the transfer of title or other interest in property and take such other action as he deems necessary or proper to dispose of such property under the provisions of this chapter. Any transaction carried out under the authority of this section

shall be evidenced in writing. The Purchasing Agent shall not dispose of any surplus property unless such property has been designated as excess property by the head of the using agency in which such property is located; nor shall the Purchasing Agent dispose of any surplus property having an estimated value exceeding one thousand dollars (\$1,000.) unless the City Manager shall have authorized the disposition of such property.

B. A deed, bill of sale, lease or other instrument executed by the Purchasing Agent purporting to transfer title or any other interest in surplus property under this chapter shall be conclusive evidence of compliance with the provisions of this chapter insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

C. The care and handling of surplus property pending its disposition may be performed by the Purchasing Agent or, when so determined by the Purchasing Agent, by the using agency in possession thereof or by any other using agency consenting thereto.

All disposals or contracts for disposals of surplus property shall be made by the Purchasing Agent only after soliciting competitive bids in conformance with the formal contract procedure for surplus property having an estimated value exceeding one thousand dollars (\$1,000.) or the open market procedure for surplus property having an estimated value of one thousand dollars (\$1,000.) or less as such procedures are prescribed in this chapter, except as provided in Subsection E of this section.

E. Disposals and contracts for disposal may be negotiated, but subject to obtaining such competition as is feasible under the circumstances, if:

- (1) The public health, safety or welfare requires a particular disposal of personal property;
- (2) Public exigency will not admit of the delay incident to advertising certain personal property;
- (3) Bid prices after advertising therefor are not reasonable, either as to all or some part of the

property, or have not been independently arrived at in open competition;

- (4) The personal property involved is exchanged or sold for similar items pursuant to this Purchasing chapter;
- (5) The personal property involved is abandoned, destroyed or donated, provided, that the approval of the City Manager shall be obtained for any donation; or
- (6) Otherwise authorized by this chapter or other law, including the Charter or Code of the City.

D. The following monies may be paid, expended or refunded without audit by the Auditor; provided, that the Auditor shall examine all such transactions not later than sixty (60) days following such payment, expenditure or refund:

- (1) Bid security monies in the custody of the County Purchasing Agent;
- (2) Bail monies in the custody of the City Court;
- (3) Monies in the War Memorial Commission Trust Account;
- (4) Monies appropriated to the Madison Code Enforcement Project NYE-3. [§ 210, L.L. No. 4 - 1925; L.L. No. 2 - 1948; L.L. No. 11 - 1963; L.L. No. 8 - 1972.]

§ 6-19 Approval of contracts.

A. Except as otherwise provided in Subsection B of this section, no contract, agreement, purchase, order or other obligation assuming to bind the city shall be entered into by any officer, employee, agent, board, department, court, division or commission of the city unless the Comptroller or Deputy Comptroller shall approve such obligation. No such obligation shall be approved in an amount in excess of money appropriated or otherwise lawfully available. Nothing herein contained shall prevent the approval of a contract or other obligation for periods exceeding one (1) year in a case where the City Council, by ordinance, authorizes the entering into of such obligation. Such approval may be evidenced by the word "Approved" and the signature of the Comptroller or Deputy Comptroller on such contract, agreement, purchase, order or obligation or in other appropriate manner. When the obligation is entered into or made, with such approval; the sum so approved shall be considered encumbered until the city is discharged from the obligation. Any officer of the city making or voting for any contract, agreement, purchase, order or other obligation prohibited by this section shall be guilty of a misdemeanor.

B. Notwithstanding the provisions of Subsection A of this section, in the case of a public emergency arising out of an accident or other unforeseen occurrence or condition

whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of the city, require immediate action which cannot await approval as required by Subsection A of this section, but subject to the provisions of § 6-16 of the Charter of the City of Rochester entitled "Expenditures in excess of appropriations prohibited," contracts, agreements, purchases, orders or other obligations involving the expenditure of money may be entered into by the appropriate officer, employee, agent, board, department, court, division or commission of the city without the approval of the Comptroller or Deputy Comptroller; provided, that the approval required by Subdivision A of this section shall be obtained as expeditiously as possible and in any event not later than three (3) days after any such obligation is incurred. In the event such approval is not obtained, the contract, agreement, purchase, order or other obligation shall be forthwith terminated. [§ 212, L.L. No. 4 — 1925; L.L. No. 22 — 1928; L.L. No. 2 — 1948; L.L. No. 11 — 1963; L.L. No. 8 — 1972.]

§ 6-20. Money deemed available.

All moneys actually in the treasury to the credit of the fund from which they may be drawn, all moneys anticipated to be received from taxes or other sources to the amounts stated in the annual budget estimate, and appropriated in the annual appropriation ordinance and other appropriations, all moneys anticipated to be received from assessments due and moneys to be derived from bonds, notes, and certificates of indebtedness, either then or previously authorized, and either sold or to be sold, shall for the purpose of the Comptroller's approval, be deemed available. [§ 213, L.L. No. 4 — 1925; L.L. No. 2 — 1948; L.L. No. 11 — 1963; L.L. No. 8 — 1972.]

§ 6-21. Obligations, when void.

All contracts, agreements, or other obligations entered into contrary to the provisions of the preceding sections in this Title shall be void and no person shall have any claim or demand against the city thereunder.

Nothing herein contained prohibits the City Manager from spending such sums as may be made available from the proceeds of budget notes issued pursuant to Section 29.00 of the Local Finance Law for the prevention of the spread of or for the suppression of any contagious or infectious diseases or any epidemic in the city, in addition to the amount appropriated for such purpose or otherwise lawfully added thereto pursuant to this local law. [§ 214, L.L. No. 4 — 1925; L.L. No. 23 — 1928; C. 710, L. 1943 (not effective until 4-2-45); § 1, L.L. No. 1 — 1970.]

§ 6-22. Deposits and accounts.

All moneys received by the City Treasurer shall be promptly deposited and placed to the credit of the city in such banks and trust companies as the Council may designate. All interest on deposits is the property of the city and must be accounted for and credited to the proper fund. Accounts with depositories shall be verified by the Treasurer at least once in each month. No money shall be drawn from such banks or trust companies except on checks or drafts signed by the Treasurer, one of his deputies, or one of his employees duly designated in writing by him and approved by the Council, countersigned by the Comptroller. Such checks shall be made payable to the person entitled to receive the same unless such moneys are for public use in the Treasurer's office, in which case such checks or drafts must be made payable to the order of the Treasurer. No money shall be paid out by the Treasurer except upon the authorization of the Auditor based upon an appropriation or authorization having been made therefor containing a sufficient unencumbered balance to cover the expenditure to be made thereon. [§ 215, L.L. No. 4 — 1925; L.L. No. 22 — 1932; L.L. No. 6 — 1933; L.L. No. 18 — 1938; L.L. No. 2 — 1948; L.L. No. 11 — 1963.]

§ 6-23. Financial reports.

The Comptroller shall prepare for the City Manager for submission to the Council complete financial reports for each quarter, for each fiscal year, and for such other periods as may be required by the City Manager. The annual financial report shall be printed for distribution as soon as possible after the close of each fiscal period. [§ 226, L.L. No. 4 — 1925; L.L. No. 8 — 1956; L.L. No. 11 — 1963.]

§ 6-24. Special and independent audits.

Upon the death, resignation, removal, or expiration of the term of any officer of the city, other than the Auditor, the Auditor shall make an audit and investigation of the accounts of such officer and shall report the condition thereof to the City Manager and the Council. Either the Council or the City Manager may at any time provide for an audit or investigation of the accounts of any office or department of the city government. In case of death, resignation, or removal of the Auditor, the City Manager shall cause an audit to be made of his accounts. If, as a result of any audit, or investigation, an officer be found indebted to the city, the Auditor or other persons making such audit, shall immediately give notice thereof to the Council, the City Manager and the Corporation Counsel, and the latter shall forthwith proceed to collect such indebtedness. The Council shall provide for an independent annual audit of the books of account, records, and transactions of the administrative departments of the city, and may provide for an audit at any other time. Such audits shall be made by certified public accountants holding certificates issued by the Regents of the University of the State of New York, or by some other state maintaining an equal standard of professional requirements. [§ 277, L.L. No. 4 — 1925.]

§ 6-25. Annual appropriations.

The several amounts contained in the annual appropriation ordinance as adopted by the Council become appropriated for the ensuing fiscal year for the several departments, bureaus, divisions, offices, courts, commissions and boards and for the purposes specified. [§ 186, L.L. No. 4 — 1925.]

§ 6-26. Levy of annual taxes.

The Council shall, at the meeting at which the appropriation ordinance is adopted, levy taxes on all real property in the city liable to assessment as set forth in the annual assessment rolls to the amount deemed by it sufficient with other revenue to produce from collection during the fiscal period the amount required to provide for interest on and principal of all indebtedness and the sums set forth in the annual budget estimate for general city and school purposes for the ensuing fiscal period. Any surplus arising from such tax reserve shall be apportioned to debt service and

general current expenses in the same proportion as taxes were levied for such purposes in the fiscal period for which such surplus accrued. The amount so apportioned to debt service shall be held and applied to the reduction of debt and taxes to be levied for debt, in the fiscal period following its accrual. [§ 187, L.L. No. 4 — 1925; L.L. No. 3 — 1945; L.L. No. 5 — 1945; L.L. No. 8 — 1948; L.L. No. 10 — 1948; L.L. No. 11 — 1948; L.L. No. 11 — 1956.]

§ 6-27. Payment of rents.

No rights or privileges shall be exercised under any written lease or grant of concessions or privileges by the city until there is endorsed thereon by the Comptroller, Deputy Comptroller or Auditor a certificate to the effect that the rents or other charges which are therein provided to be paid in advance, are paid in advance, and no such lease or grant shall be valid until the said endorsement appears thereon. [§ 228, L.L. No. 4 — 1925, as added by L.L. No. 7 — 1933; L.L. No. 8 — 1972.¹]

§ 6-28. Waiver of liquidated damages.

Whenever any contract made on behalf of the city includes a provision for liquidated damages for delay, the City Council upon recommendation of the Comptroller is authorized and empowered to remit the whole or any part of such damages as in its discretion may be just and equitable. [L.L. No. 8 — 1972.]

PART C
Purchasing Procedure

(§ 6-31. Purchases, transfers and sales.) [§ 197, L.L. No. 4 — 1925; L.L. No. 3 — 1941; L.L. No. 9 — 1962; L.L. No. 8 — 1970; repealed by L.L. No. 8 — 1972.]

(§ 6-32. Certification by Auditor.) [§ 199, L.L. No. 4 — 1925; repealed by L.L. No. 8 — 1972.]

¹ Editor's Note: L.L. No. 8 — 1972 provided for this section, which was formerly § 6-16, to be renumbered as § 6-27.

§ 6-33. Competition on purchases and sales.

It shall be the duty of the County Purchasing Agent to give opportunity for competition on all sales of city property except when the nature of the sale is such that competition is impossible or impracticable and unless the Council, by ordinance, determines that it is impossible or impracticable to sell in such manner. [§ 200, L.L. No. 4 — 1925; added by L.L. No. 10 — 1954; L.L. No. 8 — 1970; L.L. No. 8 — 1972.]

§ 6-34. Contracts exceeding one year.

The County Purchasing Agent may let contracts for periods exceeding one (1) year for street lighting, public improvements and local improvements, subject to such restrictions and conditions as the Council may prescribe. [§ 201, L.L. No. 4 — 1925; L.L. No. 8 — 1970.]

(§ 6-35. Storerooms.) [§ 198, L.L. No. 4 — 1925; L.L. No. 8 — 1970; repealed by L.L. No. 8 — 1972.]

§ 6-36. Emergency repairs.

In case of accident or other injury to the mechanical equipment of a municipal building, or to any fire apparatus, or to the Water Works system, the head of the department having jurisdiction, if in his judgment the public interest so requires, may cause repairs to be made without awarding a contract and without order of the County Purchasing Agent, but immediately after such repairs are made he shall file with the Comptroller a certificate approved by the City Manager showing such emergency and the necessity for such repairs. [§ 202, L.L. No. 4 — 1925; L.L. No. 8 — 1970.]

PART D
FUNDS AND REVENUES
1. FUNDS

§ 6-41. Local improvement fund.

The local improvement fund is continued with the moneys contained therein. There shall be placed to the credit of said fund the proceeds of the sale of all bonds and notes issued for

(Cont'd on page 111)

§ 6-1

ROCHESTER CHARTER

§ 6-1

§ 6-102. Completion of annual county assessment rolls of city properties.

§ 6-103. Taxable status of real property.

PART G
TAX AND ASSESSMENT COLLECTION

§ 6-111. Collection of taxes by City Treasurer.

§ 6-112. Items added to annual tax to be collected as a part thereof.

§ 6-113. Rates of interest on taxes.

§ 6-114. Time assessments become due and interest thereon.

§ 6-115. Publication of notices.

§ 6-116. Publication of notice for payment of local assessments.

§ 6-117. Registration of owners of real estate and tax agents.

§ 6-118. Resident owners.

§ 6-119. Appointment of tax agent by nonresident.

§ 6-120. Other proceedings for collection of county taxes.

PART II
REVIEW OF ASSESSMENTS

§ 6-131. Procedure for the review of the tentative annual city and county assessment rolls.

§ 6-132. Procedure to review local assessments.

§ 6-133. Appeals from orders as to assessments.

§ 6-134. Consolidation of proceedings.

§ 6-135. Assessments not to be otherwise reviewed.

§ 6-136. Actions to recover money paid upon assessments.

PART A
In General; Officers

§ 6-1. Comptroller.

The Comptroller shall be the head of the Department of Finance. He shall have supervision and control of the ad-

ministration of the financial affairs of the city, except the administration of the annual budget and other appropriations which will be under the supervision and control of the Director of the Budget. He shall also have supervision and control of the adjudication of violations of this code constituting stopping, standing and parking violations pursuant to a program adopted under Article 2-B of the Vehicle and Traffic Law. He shall have all the powers and shall exercise all the duties hereinafter conferred upon the several divisions of the department and shall have such other powers and duties as may be granted to him by law or ordinance. He shall appoint and may at pleasure remove each deputy and head of a bureau of the department. He shall appoint and may at pleasure remove the Assessor and the Administrative Director in the Bureau of Assessment. He shall also appoint and may at pleasure remove a secretary of the department and such other subordinates and employees of the department or any division thereof as may be prescribed by the City Manager.

All appointments to the offices and/or positions of deputies, heads of divisions and bureaus shall be subject to the approval of the City Manager. There shall be in the Department of Finance a Bureau of Audit and Accounts, a Bureau of Treasury, and a Bureau of Assessment. [§ 121, L.L. No. 4 — 1925; L.L. No. 5 — 1932; L.L. No. 18 — 1932; L.L. No. 2 — 1948; L.L. No. 4 — 1954; L.L. No. 12 — 1957; L.L. No. 8 — 1970; L.L. No. 5 — 1973]

§ 6-2. Auditor.

The head of the Bureau of Audit and Accounts shall be the Auditor.¹ He shall be the chief auditing and accounting officer of the city. He shall, prior to his appointment, have had not less than five (5) years' experience as an accountant. He shall also be a deputy of the Comptroller. [§ 122, L.L. No. 4 — 1925; L.L. No. 5 — 1932; L.L. No. 4 — 1954]

§ 6-3. City Treasurer.

The head of the Bureau of Treasury shall be the City Treasurer. He shall demand and receive, shall have the care and custody of, and shall disburse all city moneys. Except as otherwise provided for by law he shall receive all applications for permits or licenses issued by any city department, bureau or division and shall be responsible for the delivery of such licenses or permit. He shall

¹ Editor's Note: See Also § 6-11, Accounting procedure.

also be the Director of the Parking Violations Bureau established pursuant to Article 2-B of the Vehicle and Traffic Law. He shall also be a deputy of the Comptroller. [§ 123, L.L. No. 4 — 1925; L.L. No. 5 — 1932; L.L. No. 2 — 1947; L.L. No. 6 — 1951; L.L. No. 4 — 1954; L.L. No. 5 — 1973]

§ 6-4. Superintendent of Real Estate.¹

[As added by § 123-a, L.L. No. 4 — 1954; repealed by L.L. No. 4 — 1965]

§ 6-5. Purchasing Agent.

The County Purchasing Agent shall pursuant to and in accordance with the Charter of the City of Rochester and ordinances of the City Council purchase or contract for all real property authorized by the Council of the City of Rochester and materials, supplies, equipment, work and contractual services, except professional or other personal services which are in their nature unique and not subject to competition, needed by the City of Rochester and shall dispose of such real or personal property belonging to the City as shall be authorized by the Council of the City of Rochester. [§ 125, L.L. No. 4 — 1925; L.L. No. 5 — 1932; L.L. No. 23 — 1932; L.L. No. 33 — 1932; L.L. No. 34 — 1932; L.L. No. 4 — 1938; L.L. No. 2 — 1948; L.L. No. 4 — 1954; L.L. No. 11 — 1963; L.L. No. 8 — 1970; L.L. No. 8 — 1972]

PART B

Financial Provisions Generally

§ 6-11. Accounting procedure.

Insofar as practicable, all accounting including appropriation accounting, shall be centralized in the office of the Auditor. The Auditor shall require and shall receive daily reports from each department, bureau, division, office, commission, court, or board showing the receipt of all moneys and the disposition made thereof. Accounts shall be kept showing the financial transactions of all departments, bureaus, divisions, offices, commissions, courts, and boards. Accounts shall also be kept showing the financial transactions relating to all appropriations and funds. The form of all accounts shall be prescribed by the Comptroller.

¹ Editor's Note: Repeal of § 123 (§ 6-4), was inadvertently omitted from L.L. No. 6 — 1962 which enacted § 484 (§ 10-41), Superintendent of Real Estate.

Accounting procedure shall be established so that accounts will record all cash receipts and disbursements, all revenues accrued and liabilities incurred, and all transactions affecting the acquisition, custody, and disposition of assets. The funds of the city shall be classified generally as current funds, assessment funds, loan funds, sinking funds, special funds, and trust funds. For accounting purposes the Comptroller may subdivide these funds as he deems proper. [§ 204, L.L. No. 4 — 1925; L.L. No. 11 — 1963.]

§ 6-12. Examination of books.

The Comptroller has power at any time to examine the books and accounts of any department, board, bureau, court or officer of the city. [§ 161, C. 755, L. 1937.]

§ 6-13. Transfer of appropriations.

Upon the written recommendation of the City Manager, the Council may transfer an unencumbered balance, or any part thereof, of an appropriation made for the use of one department, to another or others. No such transfer shall be made of balances of revenues of the waterworks or public market. The Budget Director may, with the approval of the City Manager, transfer an unencumbered balance, or any part thereof, of any appropriation made for the use of a bureau or division to another bureau or division in the same department, and he may with such approval transfer an unencumbered balance, or any part thereof, of a line appropriation made for the use of a bureau or division, to another line appropriation for the same bureau or division. [§ 205, L.L. No. 4 — 1925; L.L. No. 4 — 1938; L.L. No. 1 — 1946; L.L. No. 2 — 1948.]

§ 6-14. Appropriation of excess revenue.

Whenever revenues from any source other than municipal taxation are received by the city and are not otherwise appropriated or directed by law to be applied, the Council may, upon recommendation of the City Manager, appropriate such revenues as it deems proper. [§ 206, L.L. No. 4 — 1925.]

§ 6-15. Expenditures pursuant to appropriations or authorizations.

No money shall be drawn from the Treasury of the city except pursuant to appropriation or authorization made by the Council.

and whenever appropriations or authorizations are so made, the City Clerk shall forthwith give notice thereof to the Comptroller and Budget Director. At the close of each fiscal year, the unencumbered balance of each appropriation, except an appropriation made for a stores fund or a capital fund, contained in the annual appropriation ordinance or legally added thereto shall revert to the fund from which it was appropriated and shall be subject to future appropriation from such fund. An appropriation from a capital fund shall continue in force until the purposes for which it was made shall have been accomplished or abandoned. [§ 207, L.L. No. 4 — 1925; L.L. No. 2 — 1948; L.L. No. 4 — 1967; L.L. No. 8 — 1972.]

§ 6-16. Expenditures in excess of appropriations prohibited.

No department, board, court, bureau, division, office, commission, officer or employee is permitted during any fiscal year to expend or contract to be expended any money, or to enter into any contract which by its terms involves the expenditures of money in excess of the amounts appropriated in the annual estimate adopted by the Council or otherwise lawfully available. Nothing herein contained shall prevent the making of a contract for periods exceeding one year in a case where the City Council, by ordinance, authorizes the making of such contract. [§ 23, C. 755, L. 1907; L.L. No. 4 — 1925; L.L. No. 4 — 1965; L.L. No. 8 — 1972.¹]

§ 6-17. Accounts for items of appropriations and authorizations.

Accounts shall be kept by the Auditor for each item of appropriation or for each authorization made by the Council and every voucher claim passed for payment on the Treasury shall state specifically against which of such items or authorizations the voucher claim is drawn. Each such account kept by the Auditor shall show in detail the appropriations or authorizations duly made thereto, the amount drawn thereon, the unpaid obligations charged against it, and the unencumbered balance to the credit thereof. [§ 209, L.L. No. 4 — 1925; L.L. No. 2 — 1948; L.L. No. 11 — 1963.]

¹ Editor's Note: L.L. No. 8 — 1972 provided that this section which was formally § 2-14, be amended and renumbered as § 6-16. Former § 6-16, Payment of rents, was renumbered as § 6-27.

§ 6-18. Examination by Auditor.

- A. No claim against the city shall be paid unless it is evidenced by a claim voucher, approved by the head of the department for which the obligation was incurred, or by such employee or employees in the department as shall be designated by the department head by a rule or written direction filed with the Comptroller, and each such officer and his surety shall be liable to the city for all loss or damage sustained by the city by reason of his negligent or corrupt approval of any claim voucher. For the purposes of this section, the head of any bureau, division, office, commission, court or board reporting directly to the City Manager shall be treated as a department head.
- B. The Auditor shall examine all payrolls, bills, and other claims and demands against the city and, except as otherwise provided in the section, shall not pass any claim for payment unless he has found that the claim is in proper form, correctly computed and duly approved; that it is justly and legally due and payable; that an appropriation or authorization has been made therefor which has a sufficient balance, and that there is money in the Treasury to make the payment. He may investigate any claim, and for that purpose may summon before him any officer, agent or employee of city, the claimant or other person, and examine him upon oath or affirmation relative thereto, which oath or affirmation he may administer. If the Auditor authorized payment of any claim for which no appropriation or authorization has been made, or for which there is no sufficient balance in the proper appropriation or fund, or which is otherwise contrary to law or ordinance, he and his sureties shall be individually liable to the city for the amount thereof.
- C. Except as otherwise provided in this section, no monies of the city, including monies collected in its behalf, and no monies in the possession, custody or control of any officer, agent, or agency of the city in his or its representative capacity and no monies in or belonging to any fund or depository which is vested in the city shall hereafter be paid, expended or refunded except upon audit by the Auditor.

Law Review Commentaries

Towards freedom of choice in employment. 13 N.Y.L.F. 213 (1967).

Library References

Civil Rights C2.

C.J.S. Civil Rights § 3.

Notes of Decisions

Compliance 4
Constitutionality 1
Legislative power 3
Purpose 2

1. Constitutionality

Provisions of this article designed to implement and effectuate legislative policy to abrogate discriminatory practices do not amount to abridgment of equitable powers of court and unconstitutional delegation of such powers to State Commission for Human Rights. *State Commission for Human Rights v. Kennelly*, 1968, 30 A.D.2d 310, 291 N.Y.S.2d 686, affirmed 23 N.Y.2d 722, 296 N.Y.S.2d 367, 244 N.E.2d 58.

This article is protected under U. S.C.A. Const. Amend. 10. *American Jewish Congress v. Carter*, 1959, 19 Misc.2d 205, 23 Misc.2d 440, 190 N.Y.S.2d 218, modified on other grounds 10 A.D.2d 833, 199 N.Y.S.2d 157, affirmed 9 N.Y.2d 223, 213 N.Y.S.2d 60, 173 N.E.2d 788. See, also, *Cooney v. Kater*, 1963, 41 Misc.2d 236, 245 N.Y.S.2d 542.

This article, Article 2-A of the Civil Rights Law directed against practice of racial or religious discrimination are not to be declared unconstitutional merely because they tend to cut down property rights of certain private property owners and may result in some financial loss to them without provision for compensation therefor; and such legislation may be sustained, as against an attack by an aggrieved property owner, unless it appears that enforcement thereof amounts to confiscation; that is, that such legislation operates to preclude use of property for any pur-

pose to which it is reasonably adapted. *New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc.*, 1958, 10 Misc.2d 224, 170 N.Y.S.2d 750.

Legislature acted within bounds of police power in enacting provisions against racial and religious discrimination in publicly-assisted housing accommodations. *Id.*

2. Purpose

Need for programmatic enforcement of anti-discrimination laws prompted creation of State Commission for Human Rights and the vesting of it with broad powers to eliminate specified unlawful discriminatory practices. *Gaynor v. Rockefeller*, 1965, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627.

The former Commission Against Discrimination was created by the Legislature to effectuate its declared policy of combatting the practice of discrimination on the basis of race, creed, color or national origin. *Holland v. Edwards*, 1954, 307 N.Y. 38, 119 N.E.2d 581, 44 A.L.R.2d 1130.

Manifest purpose and intent of law against discrimination is to provide equal protection for all people of state regardless of race, color, creed, or national origin, and landlords have as much right to that protection as any other segment of the community. *State Commission for Human Rights v. Callan*, 1968, 57 Misc.2d 504, 293 N.Y.S.2d 249.

3. Legislative power

State has power to enact laws against discrimination. *Delaney v. Conway*, 1963, 39 Misc.2d 490, 241 N.Y.S.2d 504.

4. Compliance

A partial or limited compliance with this article against discrimination in rental of housing accommoda-

tions does not constitute a substantial compliance therewith. *Cooney v. Katzen*, 1963, 41 Misc.2d 236, 245 N.Y.S. 2d 548.

§ 291. Equality of opportunity a civil right

1. The opportunity to obtain employment without discrimination because of race, creed, sex, color or national origin is hereby recognized as and declared to be a civil right.

2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of race, creed, color or national origin, as specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.

L.1951, c. 800; amended L.1964, c. 239; L.1965, c. 851, § 1.

Historical Note

1965 Amendment. Catchline. L. 1965, c. 851, § 1, eff. Sept. 1, 1965, substituted "Equality of opportunity" for "Opportunity for employment without discrimination."

Subd. 1. L.1965, c. 851, § 1, eff. Sept. 1, 1965, numbered former entire section as subd. 1.

Subd. 2. L.1965, c. 851, § 1, eff. Sept. 1, 1965, added subd. 2.

1964 Amendment. Subd. 1. L.1964, c. 239, eff. March 20, 1964, inserted "sex."

Derivation. Executive Law of 1909, § 126, added L.1945, c. 118, § 1.

Notes of Decisions

1. Union membership

One has right not to be excluded from union because of race, creed, color, or religious persuasion. *State Commission for Human Rights v. Farrell*, 1965, 24 A.D.2d 128, 204 N.Y.S.2d 489.

No right exists under Law against Discrimination to require union to take affirmative steps looking toward integration. *Id.*

§ 292. Definitions

When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

3. The term "labor organization" includes any organization which exists and is constituted for the purpose, in whole or in

Section 1. That the Council approve the filing of an application by the Rochester Urban Renewal Agency for financial assistance with the State of New York for the preparation of a community renewal program in an amount not to exceed \$25,000.

Section 2. This Ordinance shall take effect immediately.

Unanimous consent was granted to vote thereon.

Adopted unanimously.

By Councilman Parrinello—

Ordinance No. 71-219.

Amending Ordinance No. 70-229 to Change the Length of the Abandoned Portion of Times Street from 2,560 to 250 Feet as Part of the Mt. Read-Emerson Project.

Be it ordained by the Council of The City of Rochester as follows:

Section 1. Ordinance No. 70-229, adopted by the Council of the City of Rochester on May 12, 1970, is hereby amended, by changing the length of the abandoned portion of Times Street from 2,560 feet to 250 feet. All other terms and conditions of said ordinance shall remain the same.

Section 2. This Ordinance shall take effect immediately.

Unanimous consent was granted to vote thereon.

Adopted unanimously.

By Councilman Roche—

Int. No. 276.

A LOCAL LAW

TO AMEND CHAPTER SEVEN HUNDRED FIFTY-FIVE OF THE LAWS OF NINETEEN HUNDRED SEVEN, ENTITLED "AN ACT CONSTITUTING THE CHARTER OF THE CITY OF ROCHESTER" IN RELATION TO CITY DOG POUND.

Be it enacted by the Council of The City of Rochester as follows:

Section 1. Part B of Article XI-A of chapter seven hundred fifty-five of the laws of nineteen hundred seven, entitled "An Act Constituting the Charter of the City of Rochester," as last amended, is hereby further amended by adding thereto a new section to be section 11-A-11, to follow section 11-A-10, and to read as follows:

§ 11-A-11. City Dog Pound.

It is the purpose of the City Dog Pound Division to declare and enforce certain regulations and restrictions on activities of dogs and owners of dogs within the City and by so doing, to preserve the public peace and protect the property and person of the inhabitants of this City.

The supervising dog warden shall be the head of the City Dog Pound Division. He shall be appointed by and serve under the Commissioner of Community Services. He shall be responsible for the administration of all provisions and regulations of the Municipal Code relating to animals.

Section 2. This Local Law shall take effect immediately.

Referred to Law, Public Safety and Public Utilities Committee.

By Councilman Roche—

Resolution No. 71-53.

RESOLVED, that the Council hereby fixes the regular meeting of the Council to be held in the Council Chamber, Room 30, City Hall, on the 11th Day of May, 1971, at 8:00 o'clock P.M., as the time when and the place where a public hearing will be held upon the following entitled Local Law which is in final form and on the desks of the members of the Council.

"A Local Law to Amend Chapter Seven Hundred Fifty-Five of the Laws of Nineteen Hundred Seven, Entitled 'An Act Constituting the Charter of the City of Rochester' in Relation to City Dog Pound."

and be it further,

RESOLVED, that the Mayor shall give at least three days notice of the time and place of such hearing by causing such notice to be published for two days in the official papers prior to the hearing.

Adopted unanimously.

By Councilman Roche—

Ordinance No. 71-220.

Amending Ordinance 70-217, Authorizing the City Manager to File an Application with the State of New York for Financial Assistance for the Development of Open Space Project, OSC-64, \$60,000.

Be it ordained by the Council of The City of Rochester as follows:

Section 1. Ordinance No. 70-217, adopted by the Council of the City of Rochester on May 12th, 1970, is hereby amended by increasing the amount of the application from \$44,000 to \$60,000. All other terms and conditions of said ordinance shall remain the same.

Section 2. This Ordinance shall take effect immediately.

Unanimous consent was granted to vote thereon.

Adopted unanimously.

By Councilman Wood—

Resolution No. 71-54.

Whereas, there have been reported instances of alleged discrimination by public facilities against women, solely on the basis of their sex, and

Whereas, this Council must concern itself with discrimination of

every kind and nature against any and all groups, and

Whereas, the present New York State Human Rights Law does not protect women from such discrimination, and

Whereas, the United States Supreme Court has held that discrimination against women because of sex is unconstitutional, and

Whereas, legislation has been introduced in both houses of the New York State Legislature which, if enacted, would amend the New York State Human Rights Law and protect women from such discrimination,

Now, therefore it is hereby

Resolved, that this Council go on record as supporting the amendment to the New York State Human Rights Law which would protect women from such discrimination, and be it further,

Resolved, that the City Clerk be directed to forward copies of this resolution to Governor Rockefeller, State Senator Earl Brydges, Assemblyman Perry Duryea and all local State Senators and Assemblymen.

Adopted by the following vote:

Ayes — Mayor May, Councilmen Carrinello, Wood, Crimi, Kress, Ryan—4.

Nays — Councilmen Legg, Roche—2.

Councilman Lamb abstained from voting.

By Councilman Wood—

Resolution No. 71-55.

Resolution Concurring in Request by Mayor to Senate and Assembly of the State of New York Pursuant to Para. (2) of Subdivision (b) of Section 2 of Article IX of the Constitution to Enact into Law Legislation to Amend the Charter of the City of Rochester, in Relation to the Commencement of a Foreclosure in Rem by the City of Rochester where the Payment of Taxes, Assessments and Other Charges are in Arrears for a Period of Time in Excess of Two Years.

RESOLVED, that the Council of the City of Rochester, New York, hereby concurs in the request to the Legislature of the State of New York of Stephen J. May, Mayor, that the Legislature enact the legislation set forth in the following bill, entitled:

"AN ACT TO AMEND THE CHARTER OF THE CITY OF ROCHESTER, IN RELATION TO THE COMMENCEMENT OF A FORECLOSURE IN REM BY THE CITY OF ROCHESTER WHERE THE PAYMENT OF TAXES, ASSESSMENTS AND OTHER CHARGES ARE IN ARREARS FOR A PERIOD OF

TIME IN EXCESS OF TWO YEARS."

being Assembly Bill No. 7188A and Senate Bill No. 5028A; and be it further

RESOLVED, that this Resolution shall take effect immediately.

Adopted unanimously.

By Councilman Wood—

Ordinance No. 71-221.

Authorizing Contract for Consultant Services for Model Cities Evaluation Program.

Be it ordained by the Council of The City of Rochester as follows:

Section 1. The City Manager is hereby authorized to execute a contract with a qualified contractor to provide consultant services for a Model Cities evaluation program in accordance with the approved Department of Housing and Urban Development Model Cities evaluation program. The findings of said evaluation program shall be reported to the Council upon completion of said program.

Section 2. Said contract shall contain such additional terms and conditions as may be prescribed by the City Manager and shall be in a form as approved by the Corporation Counsel. The total compensation to be paid to said contractor shall not exceed the sum of \$65,000.00.

Section 3. There is hereby appropriated from the Model Cities program budget the sum of \$65,000.00 or so much thereof as may be necessary to pay for the services of the consultant under said contract.

Section 4. This ordinance shall take effect immediately.

Unanimous consent was granted to vote thereon.

Adopted unanimously.

By Councilman Wood—

Ordinance No. 71-222.

Authorizing Execution of a Contract for Consultant Services for Model Cities Resident Employment Program.

Be it ordained by the Council of The City of Rochester as follows:

Section 1. The City Manager is hereby authorized to execute a contract with Dr. Arthur Davis for the development of a Model Cities resident employment program.

Section 2. Said contract shall contain such additional terms and conditions as prescribed by the City Manager and shall be in a form approved by the Corporation Counsel and shall not exceed the sum of Three Thousand Five Hundred (\$3,500.00) Dollars.

Section 3. There is hereby appropriated from the Model Cities Budget the sum of Three Thousand Five Hundred (\$3,500.00) Dollars or

APPENDIX B

INTERIM REPORT OF THE
CIVIL SERVICE TASK FORCE
APPOINTED BY THE CITY MANAGER

In its endeavor to respond positively to its charge, namely to examine present Civil Service practices and procedures in the City of Rochester, particularly as they affect the recruitment, training, promotion and termination of minorities, the Task Force has held several meetings and analyzed the problem to the extent possible.

A number of specific problem areas were reviewed and discussed. Valuable insights and technical assistance were provided by City Personnel and City County Civil Service Commission staff. The Task Force understood perhaps for the first time the complexity of the problem with State Civil Service structures, etc.

It was the consensus of the group that the several problems identified could be best dealt with by developing a comprehensive Affirmative Action Plan for the City of Rochester. This kind of response seemed preferable to a limited point by point critique of current practices.

The model the Task Force is proposing envisions the establishment of an Affirmative Action Office within the City Manager's Office and the creation of a permanent Affirmative Action Commission.

This model is based on the recognition of the need for a continuing planning, implementation and evaluation mechanism to assure that the City of Rochester complies fully with the provisions of the Equal Employment Opportunity Act of 1972.

RESOLUTION

The City of Rochester shall develop a four-year affirmative action plan to achieve a minimum of 30% minority work force in all job classifications.

The City Manager shall appoint an Affirmative Action Commission composed of minority group representatives to advise and review the implementation of the plan.

The City Manager shall appoint on his staff an Affirmative Action Coordinator who shall act as his agent in executing the affirmative action plan and who shall provide the Affirmative Action Commission with data on the progress of the plan.

Each department shall develop its own four-year plan, working in close conjunction with the Affirmative Action Coordinator.

To facilitate the implementation of an Affirmative Action Plan, the City Manager shall direct that the following steps be undertaken immediately.

1. The Personnel Bureau shall undertake a complete and accurate census of minority members (Black, Spanish-speaking and American Indians) in its work force. This ethnic census shall become a permanent and continuing part of the City's Personnel Management Information System.
2. Each department shall submit the name of a person of at least Assistant Director level who shall be responsible for developing the department's Affirmative Action Plan. This plan shall be prepared in close conjunction with the Affirmative Action Officer and shall be submitted to the City Manager for approval. All Departmental Affirmative must be submitted and updated yearly and shall include:
 - A. The results of an ethnic and female census for each job classification, the relationship of those statistics with those of the preceeding year, and an analysis of the impediments encountered during the past year.
 - B. Outline of percentage goals and target dates for increased minority, which relate specifically to expected turnover and vacancy rates throughout the department.
 - C. Detailed steps to be taken to achieve those goals. In formulating such plans the department official shall work with Civil Service and the Personnel Department to:
 - (1) Develop entry level trainee slots.
 - (2) Plan recruitment of minority applicants.
 - (3) Review all job specs and examination procedures to assure that all barriers to equal opportunity are eliminated.

- (4) Develop career ladders within the department which encourage upward mobility of minority employees. These affirmative action plans shall be revised and updated on an annual basis.
3. The City Manager shall nominate an Affirmative Action Commission of no less than eight nor more than ten members. That Commission shall include one representative from each of the following organizations:

Action for a Better Community

FIGHT

Genesee Ecumenical Ministries or other city-wide body

Ibero American League

Model Neighborhood Council

National Organization for Women

Settlement Houses

Urban League of Rochester

The Affirmative Action Commission shall:

- A. Establish guidelines for full implementation of the provisions of this resolution.
- B. Review all proposed Departmental Affirmative Action Plans, and formally approve those which are in compliance with City policies and guidelines.
- C. Monitor and evaluate each department's compliance and progress with its Affirmative Action Plan, and recommend appropriate action to the City Manager.
- D. Meet with the City Manager on a regular quarterly basis, and upon request in order to report the progress and problems.
- E. Request and authorize studies and fact findings regarding Civil Service and personnel practices, which relate to the goals of increased employment of minorities and women.

The Commission shall have access to all documents, statistics and written policies of the City government with regard to Civil Service and personnel, except those specifically prohibited by law.

4. The City Manager shall submit a list of potential nominees as Affirmative Action Officer to the Commission at its first business session for its recommendation.

The responsibilities of the Affirmative Action Officer shall be:

- A. To review and analyze comprehensive statistics with regard to City of Rochester employment of minority group members and women.

- B. To work with the Affirmative Action Commission to develop goals, policies and procedures for increasing employment of minority group members and women at all levels of City government.
 - C. To assist each Department of City government to establish effective Affirmative Action Plans in adherence to the principles expressed in this Resolution.
 - D. To work with the Affirmative Action Commission to review and make recommendations to the City Manager for approval and/or modifications in the Affirmative Action proposals prepared by each department.
 - E. To evaluate progress of each department towards the Affirmative Action goals they have established.
 - F. To work with the City Personnel Department and the Monroe County Civil Service Commission to promote effective policies, career development recruiting and training programs towards the end of increasing employment of minorities and women.
 - G. To establish and oversee the provision of training programs for city officials on the goals and policies of Affirmative Action and on the methods for obtaining equitable representation of minority groups and women on staff.
 - H. The Affirmative Action Officer shall be responsible for counseling city employees with respect to job development and training opportunities.
 - I. Review and monitor all city contracts to assure that each contractor is in compliance with the City's Affirmative Action Guidelines for contractors.
5. All Affirmative Action Plans must obtain joint approval of the Affirmative Action Commission and the City Manager.. It shall be the policy of the City of Rochester that no department shall be authorized to fill positions after April, 1973, unless they have an approved Affirmative Action Plan, and are in compliance with it.
6. City employment opportunities are to be made known effectively to minority group citizens. Advertising, publications, and other forms of communication and contact shall be utilized in ensuring that minority persons are informed of City employment opportunities.
7. The County Civil Service Commission is urged to develop validated selection procedures for the City of Rochester, and assure that selection standards and procedures comply with the doctrine of U.S. Supreme Court decision of Griggs vs. Duke Power and with the U.S. Equal Employment Opportunity

Commission Guidelines. All City departments shall cooperate and assist the County Civil Service Commission upon request in the process of test validation.

8. When minority group eligibles are on Civil Service eligible registers, a particular effort shall be made to find appropriate positions for such eligibles. Department heads should appoint the minority group member whenever such a person is in the top three of the eligibility list.
9. The City shall assist minority and female group employees to advance through
 - A. Development of City employee training programs.
 - B. Encouragement of use of tuition benefits for additional education. The City shall counsel minority employees and women regarding opportunities and career development patterns offered by the city. The Affirmative Action Coordinator shall assist each such employee to formulate a plan for his or her career advancement.
10. Dual lists for City and non-city residents shall be requested for filing of all city jobs listed as competitive under Civil Service. All department heads shall choose from the city list until it is exhausted.
11. Dual lists for residents of target areas for federal funds, such as Model Cities and Urban Renewal, shall also be required to insure that eligible residents of the target community have priority in obtaining employment in those programs.
12. City departments shall, whenever possible, establish trainee positions under Civil Service at the paraprofessional, professional and clerical worker levels. When a position is to be vacated, the department shall replace that person with a trainee, and make a special effort to fill the traineeship with a minority group member or a women. Such traineeships shall include planned educational experiences and shall lead to automatic regular Civil Service positions, upon satisfactory completion of the training period.
13. That the City require all city contractors to formulate Affirmative Action Plans with the goal of achieving employment of minority group members in proportion to their number in the city population in all jobs benefiting from city contracts.

INTRODUCTION OF AND ACTION UPON LOCAL LAWS, ORDINANCES AND RESOLUTIONS.

By Vice Mayor Costanza -

Resolution No. 75-10.

Authorizing City Manager to Develop and Implement an Affirmative Action Program Plan for the City of Rochester.

WHEREAS, the Council of the City of Rochester hereby reaffirms its policy of equal employment opportunity for all persons regardless of such extraneous factors as race, color, sex, religion, or national origin, and

WHEREAS, the City Council recognizes that to ensure full equal employment opportunity and representation for all persons throughout City government, aggressive, on-going Affirmative Action programs must be developed and implemented;

NOW, THEREFORE, BE IT RESOLVED THAT, the City Council hereby authorizes and directs the City Manager to develop and implement an Affirmative Action Program Plan for the City of Rochester to include, but not be limited to, the following:

- I. *Goals and Timetables*
 - A. Establishment of goals and timetables for the recruitment and promotion of minorities and women.
 - B. Representation of minorities and women in all job categories throughout City government at least in proportion to their percentages in the City's labor force. The City Manager is directed to employ every feasible means in an effort to achieve this goal within five years, recognizing that the rate of progress in each job category will vary depending upon turnover and expansion or contraction within job categories.
- II. *Methods*
 - A. Evaluation of existing personnel practices and procedures; that is, recruitment, selection, promotion, transfer and training.
 - B. Establishment of upward mobility and career development programs.
 - C. Establishment of a vigorous and continuous campaign to recruit, select, train and promote women and minorities.
 - D. Development of trainee positions, designed to facilitate promotion into middle and upper-level job categories.
- III. *Administrative Responsibility*
 - A. The City Manager shall be responsible for the administration of Affirmative Action across all organizational lines.
 - B. Department Heads shall be responsible for implementation of Affirmative Action Plans within their departments.
 - C. The Affirmative Action Officer shall monitor and evaluate the City's Affirmative Action Program and provide technical assistance and guidance to Department Heads; and shall coordinate all Affirmative Action activities, and provide the City Manager with timely reports on progress and problems with recommendations for corrective action.
 - D. The Personnel Director shall coordinate Affirmative Action with personnel related functions, i.e., employment, payroll and benefits administration, job classification and training.

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IV. *Review Responsibility*

The City Manager will appoint an Affirmative Action Board of Review to assist in reviewing and evaluating Departmental Affirmative Action Plans and progress on the execution of the City's Affirmative Action Plan; and to recommend appropriate remedial action to the Affirmative Action Officer.

V. *The Board of Review Shall*

1. Review and comment on Affirmative Action Plans, guidelines and periodic progress reports.
2. Advise on the establishment of guidelines for full implementation of the provisions of the City's Affirmative Action Plan.
3. Evaluate Civil Service and personnel practices, which relate to the goals of increased employment of minorities and women.
4. Have access to appropriate documents, statistics and written policies of City Government with regard to Civil Service and personnel, except those specifically prohibited by law.
5. When position of Affirmative Action Officer is vacant, appoint three of its members to assist the Personnel Director and the City Manager in screening candidates for Affirmative Action Officer.
6. Periodically review census of minority members in the City work force as prepared by the Personnel Bureau.
7. Review guidelines for contract compliance by June, 1975.

VI. *Reporting*

The City Manager shall submit an annual Affirmative Action progress report to the City Council containing a census of the employee population by race, sex, and job category.

VII. *Contract Compliance*

The City Manager shall be directed to develop and implement contract compliance procedures beginning on and continuing after January 1, 1975.

All City contractors, lessors, vendors, and suppliers will be sent copies of the City's Affirmative Action policy statement. The City will include non-discrimination clauses in all bid documents, contracts and leases. Contractors, lessors, vendors and suppliers shall agree to comply with all state and federal equal employment opportunity laws and regulations, and shall submit documentation regarding equal opportunity and affirmative action as required or requested by the City. The City will give preference in the award of all contracts and leases to contractors, lessors, vendors and suppliers who have or participate in a written Affirmative Action Plan, wherever such preference is legal and feasible.

Adopted unanimously.

February 11, 1975

TO THE HONORABLE MEMBERS OF CITY COUNCIL:

Ordinance No. 75-49

Re: L.E.A.A. Grant for operation of
a Victim and Witness Assistance
Center in the Rochester Police
Department

I am hereby transmitting for your consideration an ordinance authorizing the City Manager to submit an application and execute a contract with the New York State

AFFIRMATIVE ACTION
POLICIES AND PRINCIPLES STATEMENT

RESOLUTION

WHEREAS, the Council of the City of Rochester hereby reaffirms its policy of equal employment opportunity for all persons regardless of such extraneous factors as race, color, sex, religion, or national origin, and

WHEREAS, the City Council recognizes that to ensure full equal employment opportunity and representation for all persons throughout City government, aggressive, on-going Affirmative Action programs must be developed and implemented;

NOW, THEREFORE, BE IT RESOLVED THAT, the City Council hereby authorizes and directs the City Manager to develop and implement an Affirmative Action Program Plan for the City of Rochester to include, but not be limited to, the following:

I. Goals and Timetables

- A. Establishment of goals and timetables for the recruitment and promotion of minorities and women.
- B. Representation of minorities and women in all job categories throughout City government at least in proportion to their percentages in the City's labor force; The City Manager is directed to employ every feasible means in an effort to achieve this goal within five years, recognizing that the rate of progress in each job category will vary depending upon turnover and expansion or contraction within job categories.

II. Methods

- A. Evaluation of existing personnel practices and procedures; that is, recruitment, selection, promotion, transfer and training.
- B. Establishment of upward mobility and career development programs.
- C. Establishment of a vigorous and continuous campaign to recruit, select, train and promote women and minorities.
- D. Development of trainee positions, designed to facilitate promotion into middle and upper-level job categories.

III. Administrative Responsibility

- A. The City Manager shall be responsible for the administration of Affirmative Action across all organizational lines.
- B. Department Heads shall be responsible for implementation of Affirmative Action Plans within their departments.
- C. The Affirmative Action Officer shall monitor and evaluate the City's Affirmative Action Program and provide technical assistance and guidance to Department Heads; and shall coordinate all Affirmative Action activities, and provide the City Manager with timely reports on progress and problems with recommendations for corrective action.
- D. The Personnel Director shall coordinate Affirmative Action with personnel related functions, i.e., employment, payroll and benefits administration, job classification and training.

IV. Review Responsibility

The City Manager will appoint an Affirmative Action Board to Review to assist in reviewing and evaluation Departmental Affirmative Action Plans and progress on the execution of the City's Affirmative Action Plan; and to recommend appropriate remedial action to the Affirmative Action Officer.

The Board of Review Shall

1. Review and comment on Affirmative Action Plans, guidelines and periodic progress reports.
2. Advise on the establishment of guidelines for full implementation of the provisions of the City's Affirmative Action Plan.
3. Evaluate Civil Service and personnel practices, which relate to the goals of increased employment of minorities and women.
4. Have access to appropriate documents, statistics and written policies of City Government with regard to Civil Service and personnel, except those specifically prohibited by law.
5. When position of Affirmative Action Officer is vacant, appoint three of its members to assist the Personnel Director and the City Manager in screening candidates for Affirmative Action Officer.
6. Periodically review census of minority members in the City work force as prepared by the Personnel Bureau.
7. Review guidelines for contract compliance by June, 1975.

V. Reporting

The City Manager shall submit an annual Affirmative Action progress report to the City Council containing a census of the employee population by race, sex, and job category.

VI. Contract Compliance

The City Manager shall be directed to develop and implement contract compliance procedures beginning on and continuing after January 1, 1975.

All City contractors, lessors, vendors, and suppliers will be sent copies of the City's Affirmative Action policy statement. The City will include non-discrimination clauses in all bid documents, contracts and leases. Contractors, lessors, vendors and suppliers shall agree to comply with all state and federal equal employment opportunity laws and regulations, and shall submit documentation regarding equal opportunity and affirmative action as required or requested by the City. The City will give preference in the award of all contracts and leases to contractors, lessors, vendors and suppliers who have or participate in a written Affirmative Action Plan, wherever such preference is legal and feasible.

CITY OF ROCHESTER, NEW YORK

AFFIRMATIVE ACTION PLAN

February, 1975

Elisha C. Freedman
City Manager

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INTRODUCTION

Nineteen seventy-four marked the end of an important decade in American history. It has been ten years since the enactment of the Civil Rights Act of 1964, the first major anti-discrimination legislation in nearly one hundred years.

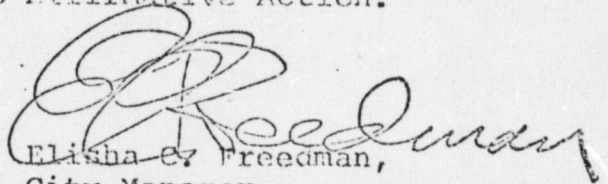
It has been an intense ten years which has seen extensive Federal, State and local legislation, several Presidential Executive Orders, and a number of landmark Supreme Court decisions, all of which mandate that employers take positive action to eliminate employment discrimination based on race, color, sex, religion or national origin.

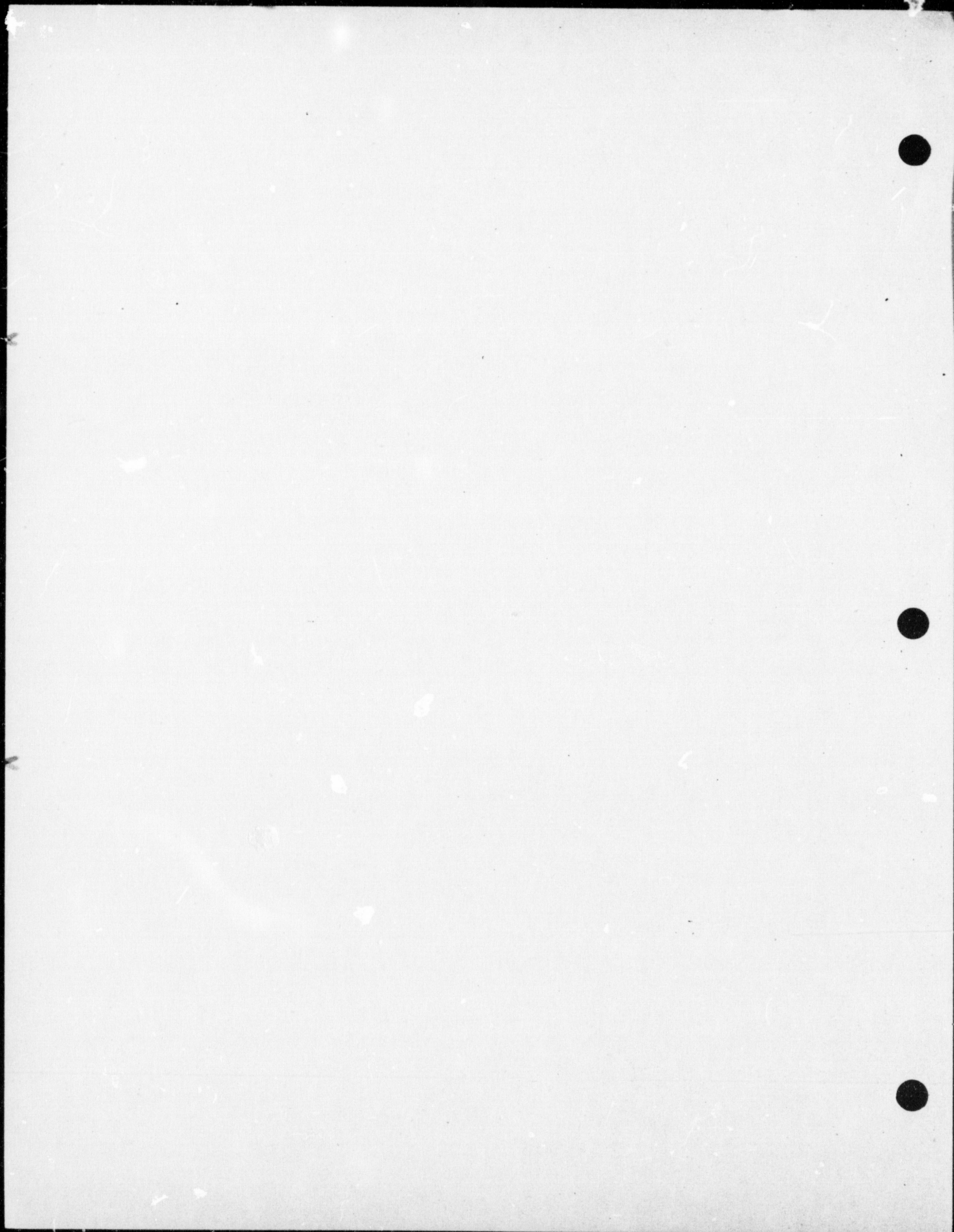
Today, it is not enough for employers to merely pronounce that they are an "Equal Opportunity Employer". All too often, these pronouncements remain in the realm of rhetoric and are eventually reduced to vague and empty words. This fact becomes more clear when one inspects employment statistics which reveal that minorities and women are still subject to discriminatory employment patterns and practices and suffer disproportionately from the effects of pervasive discrimination.

The time has come for employers to thoroughly examine their employment systems and ferret out invidious barriers to equal employment opportunities for minorities and women. To achieve this end, aggressive, ongoing affirmative action is needed.

The City of Rochester is committed to the philosophy of Affirmative Action and to achieving fair and equitable employment practices and procedures.

What we have outlined in this plan are necessary steps toward ensuring that all persons, regardless of race, color, sex, religion, or national origin, will have equal employment opportunity in City government. However, this plan is only the beginning, and to think that because we have this plan our job is done would be to delude ourselves. Our work is before us. Our goals and objectives will be realized only through our tenacious efforts and firm commitment to Affirmative Action.


Elisha C. Freedman,
City Manager



CITY OF ROCHESTER
AFFIRMATIVE ACTION PLAN

I. AFFIRMATIVE ACTION GENERAL POLICY STATEMENT

It is the policy of the City of Rochester to meet its responsibility of equal employment opportunity for all persons regardless of race, color, sex, religion, or national origin. The City recognizes its moral and legal obligations to take affirmative and decisive action to improve employment opportunities for minorities and women who have historically been discriminated against in their quest for economic security and human dignity.

II. ULTIMATE GOAL

- A. To eradicate employment discrimination based on race, color, sex, religion, or national origin at all job levels throughout City government.

III. GENERAL OBJECTIVES

- A. To achieve representation of minorities and women in all job categories throughout City government at least in proportion to their percentages in the City's labor force.
- B. To increase the proportion of minorities and women in middle and upper job categories (Official and Administrative, Professional, Technician, and Protective Services) from which they have traditionally been barred.
- C. To evaluate all personnel policies and procedures in order to identify and eliminate artificial barriers to the employment of minorities and women.
- D. To establish a vigorous and continuous campaign to recruit, select, train, and promote minorities and women.

IV. ADMINISTRATIVE DUTIES AND RESPONSIBILITIES

A. CITY MANAGER SHALL:

1. Be responsible for the administration of Affirmative Action across all organizational lines.
2. Review each individual department head's Affirmative Action performance at least once a year.
3. Ensure that department heads promote equal employment opportunity policies and practices in all departmental operations.
4. Ensure that all City personnel comply with the goals and objectives of the Affirmative Action Plan.

B. PERSONNEL DIRECTOR SHALL:

1. Coordinate Affirmative Action with other personnel-related functions, i.e., employment, payroll and benefits administration, job classification and training.

C. AFFIRMATIVE ACTION OFFICER SHALL:

1. Coordinate the City's Affirmative Action Program and provide guidance and direction to and monitor the administration of departmental affirmative action programs.
2. Provide the City Manager with timely reports on progress and problems with recommendation for corrective action.
3. Serve as liaison between City Administration and Affirmative Action Board of Review.
4. Provide technical advice and guidance to Department Heads and designated subordinate management level personnel on methods and procedures for effective recruitment, selection and placement and promotion of minority personnel and women.
5. Review regularly departmental affirmative action programs with departmental affirmative action coordinators to determine status.
6. Coordinate with Employment and Technical Services Divisions of Personnel Bureau in development and implementation of effective recruitment, selection, placement, promotion, training and appraisal programs designed to effectuate successful employment and promotional programs for minority and women employees.
7. Coordinate with Employment and Payroll Services Division of the Personnel Bureau in the collection and analysis of employment, promotion and turnover data as it relates to minority and female employees.
8. Review and recommend modifications to job descriptions.
9. Develop and implement training and development programs designed to facilitate upward job mobility for minority and female employees.
10. Coordinate with Monroe County Civil Service Commission relative to validating examinations, recruiting activities and development of entry level job requirements designed to facilitate employment of minorities and women.

11. Evaluate, audit and provide guidance in the implementation of departmental affirmative action programs.
12. Assist in the development and implementation of career ladders in all City departments.
13. Coordinate with Employment Division to assure adequate dissemination of information relative to employment opportunities.
14. Provide guidance and counsel to Labor Relations personnel to assure adequate affirmative action input in the negotiations process and labor agreement administration.
15. Provide staff assistance to other City staff in pursuing compliance of City contractors with Affirmative Action requirements.
16. Provide public information regarding affirmative action to the community.

D. DEPARTMENT HEADS SHALL:

1. Department Heads shall be held accountable for implementation of Affirmative Action Plans within their department.
2. Appoint a high-level management person as departmental Affirmative Action Coordinator. This appointment is necessary to assure that Affirmative Action receives top priority and management support within the departments.
3. Analyze existing employment problems and implement corrective measures where necessary.
4. Review supervisory performance to ensure positive application and vigorous enforcement of Affirmative Action policies and principles.
5. Assist in the resolution of any and all personnel problems related to Affirmative Action.

E. DEPARTMENTAL AFFIRMATIVE ACTION COORDINATORS SHALL:

1. Collect and synthesize employment data for the purpose of establishing departmental employment goals for minorities and women.
2. Identify existing departmental employment problems and recommend to department heads and the Affirmative Action Officer corrective action.

3. Prepare and coordinate departmental Affirmative Action Plans.
4. Assist the Personnel Department in the recruitment of minorities and women.
5. Assist the Personnel Department in the orientation of new employees and training of supervisors in Affirmative Action principles and programs.
6. Establish and maintain proper Affirmative Action records on all employees.
7. Submit quarterly reports to department heads and the Affirmative Action Officer on the status and progress of the action plans.
8. Inform employees of the availability of career services, job opportunities, and training programs.
9. Assist in the resolution of discrimination complaints and other problems associated with equal employment opportunity.

F. AFFIRMATIVE ACTION BOARD OF REVIEW:

The City Manager will appoint an Affirmative Action Board of Review to assist in reviewing and evaluating Departmental Affirmative Action Plans and progress on the execution of the City's Affirmative Action Plan; and to recommend appropriate remedial action to the Affirmative Action Officer.

The Board of Review shall consist of fifteen (15) members and shall be comprised of representatives from affected target groups, employee groups and other community organizations.

Members shall serve for a term of three (3) years except that initial appointments to the Board shall be for terms of office as follows:

First	5 members	1 year
Second	5 members	2 years
Third	5 members	3 years

Members shall be eligible to succeed themselves on the Board.

The Affirmative Action Officer shall be Executive Secretary of the Board who shall prepare the agenda for the monthly meetings and provide necessary administrative services.

The Board of Review shall choose its own Chairperson and adopt its own By-laws.

The Board of Review Shall:

1. Review and comment on Affirmative Action Plans, guidelines and periodic progress reports.
2. Advise on the establishment of guidelines for full implementation of the provisions of the City's Affirmative Action Plan.
3. Evaluate Civil Service and personnel practices, which relate to the goals of increased employment of minorities and women.
4. Have access to appropriate documents, statistics and written policies of the City government with regard to Civil Service and personnel, except those specifically prohibited by law.
5. When position of Affirmative Action Officer is vacant, appoint three of its members to assist the Personnel Director and the City Manager in screening candidates for Affirmative Action Officer.
6. Periodically review census of minority members in the City work force as prepared by the Personnel Bureau.
7. Review guidelines for contract compliance by June, 1975.

V. MINORITY GROUPS

A. DEFINITION:

Minority groups for statistical and report purposes have been defined as follows:

1. BLACK: persons of African descent including West Indians
2. SPANISH-SURNAMED: persons of Puerto Rican, Cuban, Mexican, Latin, or Spanish descent
3. AMERICAN INDIANS: Native Americans
4. ASIAN AMERICANS: persons of Chinese, Japanese, Korean, or Filipino descent
5. OTHERS: includes Eskimos, Malavans and all ethnic groups not classified above

LABOR FORCE STATISTICS FOR MINORITIES AND WOMEN

A. MINORITIES:

According to the 1970 Census, minorities comprised approximately 17 percent of the total labor force in the City of Rochester. It has been estimated that by 1980, minorities will represent approximately 25 percent of the City's labor force. Consequently, the City's five-year minority employment goal will be the attainment of Labor force parity (25 percent)* in all job categories, recognizing that the rate of progress in each job category will vary depending upon turnover and expansion or contraction within job categories.

B. WOMEN:

In 1970, women comprised 43 percent of the City's labor force; however, it becomes somewhat difficult to project an accurate future labor force percentage for women. One very important reason is that there is a significant percentage of women who choose either to leave or not to enter the labor market because of domestic considerations. Therefore, the 43 percent* (in all job categories) will be used as a tentative goal, and this goal will be reviewed annually to reflect accurate labor force statistics.

*The 25 percent minority figure includes all minority group members; i.e., both minority males and females (See Section V p.5). The 43 percent female figure includes all females. The goal of the plan for each group should be considered separately, and not cumulatively.

VII. MINORITY AND FEMALE WORK FORCE COMPOSITION FOR CITY GOVERNMENT

A. TABLE 1

Table 1 (Appendix D) presents a breakdown of the City's minority and female work force as of December 31, 1974.

VIII. CREATION AND IMPLEMENTATION OF DEPARTMENTAL AFFIRMATIVE ACTION PLANS

A. DEPARTMENTAL AFFIRMATIVE ACTION PLANS SHALL:

1. Be based on the model which is included as Appendix A. Appendix B contains the definitions of the job families or categories (taken from the EEO-4 Report) to be utilized in the plans.
2. Outline percentage goals (using labor force ratios) and timetables for increased minority and female employment. In addition to numerical goals, action plans are to outline specific problems and deficiencies and recommendations for corrective actions.

B. DEPARTMENTAL GOALS SHALL:

1. Be realistic, measurable and significant and will reflect at least the percentage of minority groups and women in the City's labor force.
2. Consider rates of turnover, expansion and contraction in establishing specific result-oriented approaches to increasing employment of minorities and women.
3. Address the under-utilization and concentration of minorities and females in lower level job categories and provide specific remedies.
4. Address all aspects of personnel administration and, where necessary, establish corrective steps to eradicate artificial barriers to increased minority and female employment.

C. DEPARTMENTAL TIMETABLES SHALL:

1. Be based on a five-year time frame; however, if departmental goals and objectives can be accomplished in a shorter period of time due to increased availability of required skills in the labor market, unexpected expansion, high turnover, then efforts should be made to ensure that this will be done.

IX. JOB RESTRUCTURING AND UPWARD MOBILITY

A. JOB SPECIFICATIONS:

1. The City will commence a review of job specifications by department beginning on and continuing after January 1, 1975.
2. The City will request the Monroe County Civil Service Commission to review the revised job specifications on a regularly scheduled basis.
3. In the review of job specifications, every attempt will be made to remove those requirements or qualifications that are not job-related thereby assuring that barriers to equal opportunity are eliminated.
4. The City will request the Monroe County Civil Service Commission to assist in developing measures by which the validity of job specifications might be appraised.

B. UPWARD MOBILITY:

1. Career ladders will be developed within each department to encourage upward mobility for all employees.
2. Training programs will be developed and implemented to provide impetus to upward mobility and job improvement. Training programs will be designed to provide promotional preparation for employees and enhance opportunities for employment among minorities and women.
3. Each department will develop appropriate entry level trainee positions for all job categories with emphasis on higher and middle job categories, i.e., official and administrative, professional, technician, and protective services.

X. RECRUITMENT

A. RESPONSIBILITY:

1. The Personnel Department is responsible for developing and maintaining an aggressive, comprehensive and exhaustive recruitment program.

B. METHODS:

1. The Personnel Department will establish and maintain a list of all organizations representing racial minorities and women. Notices of City job openings will be sent to these organizations.
2. The Affirmative Action Officer will develop a cooperative working relationship with community groups, high schools, educational institutions and other agencies that are concerned with the employment of minorities and women.
3. The Personnel Department will establish and maintain a system of retaining and retrieving minority and female applications.
4. The Personnel Department will develop recruiting literature, and where photographs are used, minority and women employees will be shown.
5. There will be effective utilization of all media in disseminating job information.

XI. SELECTION

A. SELECTION PROCEDURES:

1. The Monroe County Civil Service Commission will be urged to develop validated selection procedures for the City of Rochester, and assure that selection standards and procedures comply with the doctrine of the U.S. Supreme Court decision of Griggs vs. Duke Power, and with the U.S. Equal Employment Opportunity Commission Guidelines. All City departments shall cooperate with and assist the Monroe County Civil Service Commission upon request in the process of test validation.
2. Where it will enhance the opportunity for the appointment of minorities and women, dual lists by City residence will be requested from open competitive examinations.
3. The City will request the Monroe County Civil Service Commission to include minority group members and women on oral examining boards and interviewing committees.

XII. PROMOTION

A. PROMOTIONAL OPPORTUNITIES:

1. The Affirmative Action Coordinators will periodically review the qualifications of minority and female employees. Each department will recommend to the Personnel Bureau for training or promotion those individual employees who are qualified for higher-level positions.
2. The Personnel Bureau will be responsible for advertising promotional opportunities to all employees.

XIII. TRAINING AND EDUCATION

A. CAREER DEVELOPMENT:

1. The Personnel Bureau shall develop and implement career counseling programs for minority and women employees regarding opportunities and career development programs offered by the City. The departmental Affirmative Action Coordinators shall assist such employees to formulate plans for career advancement.
2. The City shall provide training for management and supervisory personnel in Affirmative Action policies and principles. Such training will equip management to deal with problems of minorities and women and other related Affirmative Action problems.

XIV. DISSEMINATION OF AFFIRMATIVE ACTION POLICY

A. INTERNAL:

1. The City Manager will meet with Department Heads at least twice a year to discuss the City's Affirmative Action Plan and to reaffirm the City's commitment to Affirmative Action.
2. Department Heads will meet regularly with subordinate level management personnel to disseminate Affirmative Action policies and procedures. Each department is responsible for developing a mechanism to inform each employee of the Affirmative Action policy.
3. The City's Affirmative Action policy will be explained in all orientation programs for new employees.
4. The Affirmative Action policy will be stressed in top-management and supervisory training programs.
5. A copy of the City's Affirmative Action Plan will be available in each department.

B. EXTERNAL:

1. Written notification of the City's Affirmative Action Policy will be sent to local minority and women's organizations, all other recruitment sources, and temporary help services.
2. The City shall utilize advertising, publications, postings and other forms of communications and contact to disseminate Affirmative Action Policy. Special efforts will be made to disseminate Affirmative Action Policy through local media programs geared for minority audiences.
3. The City's collective bargaining agreements shall contain an anti-discrimination clause covering all parts of the agreement.
4. The phrase, "Equal Opportunity Employer" shall appear on official City letterhead and recruitment literature.

XV. CONTRACT COMPLIANCE

- A. All City contractors, lessors, vendors, and suppliers will be sent copies of the City's Affirmative Action policy statement. The City will include non-discrimination clauses in all bid documents, contracts and leases. Contractors, lessors, vendors and suppliers shall agree to comply with all state and federal equal employment opportunity laws and regulations, and shall submit documentation regarding equal opportunity and affirmative action as required or requested by the City. The City will give preference in the award of all contracts and leases to contractors, lessors, vendors and suppliers who have or participate in a written Affirmative Action Plan, wherever such preference is legal and feasible.

XVI. INTERNAL AUDIT AND REPORTING

A. EVALUATION:

1. The Affirmative Action Officer working with departmental Affirmative Action Coordinators will establish a system of recording employment statistics of all City departments to determine whether or not affirmative action goals and timetables are being met.
2. The Affirmative Action Officer will prepare and submit a quarterly report on the status of the affirmative action program to the Personnel Director, City Manager, Board of Review, Mayor, and Council.
3. The Affirmative Action Board of Review will evaluate progress reports on affirmative action and will recommend to the City Manager corrective action where there has been unsatisfactory performance.
4. Once a year a complete and thorough review of departmental action plans will be conducted by the Affirmative Action Officer to assess overall performance.

APPENDIX "A"

EXPLANATION

Appendix A contains the structure for the goals and timetables for the City and departmental Affirmative Action Plans.

- Box A contains current data and percentages.
- Box B will contain the percentage and number of replacements for the first year.
- Box C will contain the starting figure for the beginning of the second year; that is, a total of Boxes A and B.
- Boxes D - J - The process described for Boxes B and C will be followed for years 2 through 5 and will be reflected in Boxes D through J.

JOB CATEGORIES	1974-1975	1975-1976	1976-1977	1977-1978	1978-1979
TOTAL	(A) PRESENT WOMEN No. 8 (B) OF PROJECTED REPLACEMENTS No.	(C) A + B = (D) OF PROJECTED REPLACEMENTS No.	(E) C + D = (F) OF PROJECTED REPLACEMENTS No.	(G) E + F = (H) OF PROJECTED REPLACEMENTS No.	(I) G + H = (J) OF PROJECTED REPLACEMENTS No.
ADMINISTRATION					
PROFESSIONAL					
TECHNICIANS					
PROTECTIVE SERVICES					
PARA-PROFESSIONAL					
CLERICAL					

[illegible]



APPENDIX "B"

JOB CATEGORIES

OFFICIALS AND ADMINISTRATORS: Occupations in which employees set broad policies, exercise overall responsibility for execution of these policies, or direct individual departments or special phases of the agency's operations, or provide specialized consultation on a regional, district or area basis. Includes: department heads, bureau chiefs, division chiefs, directors, deputy directors, controllers, examiners, wardens, superintendents, unit supervisors, sheriffs, police and fire chiefs and inspectors and kindred workers.

PROFESSIONALS: Occupations which require specialized and theoretical knowledge which is usually acquired through college training or through work experience and other training which provides comparable knowledge. Includes: personnel and labor relations workers, social workers, doctors, psychologists, registered nurses, economists, dieticians, lawyers, system analysts, accountants, engineers, employment and vocational rehabilitation counselors, teachers or instructors, police and fire captains and lieutenants and kindred workers.

TECHNICIANS: Occupations which require a combination of basic scientific or technical knowledge and manual skill which can be obtained through specialized post-secondary school education or through equivalent on-the-job training. Includes: computer programmers and operators, draftsmen, surveyors, licensed technicians, (medical, dental, electronic, physical sciences), assessors, inspectors, police and fire sergeants and kindred workers.

PROTECTIVE SERVICE WORKERS: Occupations in which workers are entrusted with public safety, security and protection from destructive forces. Includes: police patrol officers, fire fighters, guards, deputy sheriffs, bailiffs, correctional officers, detectives, marshals, harbor patrol officers and kindred workers.

PARAPROFESSIONALS: Occupations in which workers perform some of the duties of a professional or technician in a supportive role, which usually require less formal training and/or experience normally required for professional or technical status. Such positions may fall within an identified pattern of staff development and promotion under a "New Careers" concept. Includes: library assistants, research assistants, medical aides, child support workers, police auxiliary, welfare service aides, recreation assistants, homemakers aides, home health aides, and kindred workers.

OFFICE AND CLERICAL: Occupations in which workers are responsible for internal and external communication, recording and

retrieval of data and/or information and other paper work required in an office. Includes: bookkeepers, messengers, office machine operators, clerk-typists, stenographers, court transcribers, hearing reporters, statistical clerks, dispatchers, license distributors, payroll clerks and kindred workers.

SKILLED CRAFT WORKERS: Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the processes involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen, electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers.

SERVICE/MAINTENANCE: Occupations in which workers perform duties which result in or contribute to the comfort, convenience, hygiene or safety of the general public or which contribute to the upkeep and care of buildings, facilities or grounds of public property. Workers in this group may operate machinery. Includes: chauffeurs, laundry and dry cleaning operatives, truck drivers, bus drivers, garage laborers, custodial personnel, gardeners and groundkeepers, refuse collectors, construction laborers.

APPENDIX "C"

The following organizational components within the City Government structure will be required to establish "departmental" Affirmative Action Plans:

Police
Fire
Community Development
Parks and Recreation
Public Library
Buildings and Property Conservation
Public Works
City Manager's Office (to include
the following)

- Program Development
- Personnel
- Finance
- Labor Relations
- Public Information
- Law
- Courts

TABLE 1

MINORITY AND FEMALE WORK FORCE COMPOSITION FOR
CITY GOVERNMENT AS OF DECEMBER 31, 1974

JOB CATEGORIES	TOTAL NUMBER OF EMPLOY- EES	BLACK		SPANISH- SURNAMED		OTHER		WOMEN		TOTAL NON-WHITE	
		No.	%	No.	%	No.	%	No.	%	No.	%
OFFICIALS AND ADM.	71	3	4.2	2	2.8	-	-	7	9.9	5	7.0
PROFESS- IONAL	598	34	5.7	5	.8	3	.5	121	20.2	42	7.0
TECHNI- CIANS	302	14	4.6	3	1.0	1	.3	9	2.9	18	5.9
PROTECTIVE SERVICES	163	32	3.3	1	.1	-	-	4	.4	33	3.4
PARA PROFESS- IONAL	152	40	26.3	7	4.6	-	-	55	36.2	47	30.9
OFFICE/ CLERICAL	473	28	5.9	9	1.9	-	-	415	87.7	37	7.8
SKILLED CRAFT	261	25	9.6	12	4.6	1	.4	1	.4	38	14.6
SERVICE/ MAIN.	987	281	28.5	95	9.6	1	.1	41	4.1	377	38.2
TOTAL	3807	457	12.0	134	3.5	6	.1	653	17.2	597	15.7

APPENDIX "D"